90-1616

Supreme Court, U.S.
FILED
APR 5 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO,
Petitioner,

v.

LARRY WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Alan R. Mayberry
Wood County Prosecuting Attorney
Counsel of Record
One Courthouse Square
Bowling Green, Ohio 43402
(419) 354-9250

Attorney for Petitioner

QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence seized pursuant to a warrant which the judge intended to issue but inadvertently failed to sign?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOKED 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

REASONS FOR GRANTING THE WRIT 5

I. THE REFUSAL OF THE SUPREME COURT OF OHIO TO APPLY THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE TO THE FACTS OF THIS CASE CONFLICTS WITH THE TENOR OF DECISIONS BY THIS COURT AND DECISIONS OF VARIOUS FEDERAL AND STATE COURTS 5

A. The Decision Below Conflicts With Decisions Of This Court 7

B. The Decision Below Conflicts With Decisions Of Various Federal Circuit Courts of Appeals 10

C. The Decision Of The Court Below Conflicts With Decisions Of Other State Courts of Last Resort 11

D. State Courts Are In Conflict Over This Issue 13

CONCLUSION 14

APPENDIX INDEX 19

TABLE OF AUTHORITIES

CASES Page

Byrd v. Commonwealth, 261 S.W.2d 437 (Ky. 1953)....13

Commonwealth v. Pellegrini, 405 Mass. 86, 539 N.E.2d 514, *cert. denied*, ___ U.S. ___, 110 S. Ct. 497, 107 L. Ed.2d 501 (1989).....11

Massachusetts v. Sheppard, 468 U.S. 981 (1984) . 6,8,9,10

People v. Hentkowski, 154 Mich. App. 171, 397 N.W.2d 255 (1986).....13

State v. Spaulding, 239 Kan. 439, 720 P.2d 1047 (1986) ... .12

State v. Spaw, 18 Ohio App. 3d 77, 480 N.E.2d 1138 (1984).....6,7

State v. Suroweicki, 184 Conn. 95, 440 A.2d 798 (1981)... 13

State v. Williams, 57 Ohio St. 3d 24, 565 N.E.2d 563 (1991) 13

State v. Wilmoth, 22 Ohio St. 3d 251, 490 N.E.2d 1236 (1986).....6

United States v. Burke, 517 F.2d 377 (2d Cir. 1975)..10,11

United States v. Dauphinee, 538 F. 2d 1 (1st Cir. 1976)..10

United States v. Hall, 505 F.2d 961 (3rd Cir. 1974).....10

United States v. Kennedy, 457 F.2d 63 (10th Cir.), *cert. denied*, 409 U.S. 864 (1972)..... 11

United States v. Leon, 468 U.S. 897 (1984)....6,7,8,12,13

United States v. McKenzie, 446 F.2d 949 (6th Cir. 1971).. 10

United States v. Turner, 558 F.2d 46 (2d Cir. 1977).. 10,11

Yuma County Attorney v. McGuire, 109 Ariz. 471, 512 P.2d 14 (1973)..... 11

Zachinni v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 7

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV.....5,6,8,10,12

Ohio Const. art. I, § 14..... 10

STATUTES

28 U.S.C. § 1257(a).....1

Ohio Rev. Code § 2933.21 et seq 10

Ohio Rev. Code § 2933.25.....6

RULES

Fed. R. Crim. P. 41.....6,10,11

Ohio R. Crim P. 41 6,10,11

MISCELLANEOUS

Attorney General's Task Force on Violent Crime, Final Report (1981) 13,14

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO,
Petitioner,

v.

LARRY WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the court below (Appendix) is reported at 57 Ohio St. 3d 24, 565 N.E.2d 563 (1991).

JURISDICTION

The decision of the court below was entered on January 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOKED

FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

ARTICLE ONE, SECTION 14 OF THE OHIO CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

STATUTORY PROVISIONS

OHIO REVISED CODE § 2933.21, et seq.

OHIO R. CRIM. P. 41

FED. R. CRIM. P. 41

{See appendix}

STATEMENT OF THE CASE

On July 16, 1988, Larry E. Williams ("Respondent") was arrested and charged with one (1) count of trafficking in marijuana, a felony of the third degree.

On November 16, 1988, Respondent's motion to suppress was filed on the basis, *inter alia*, that the search violated the Respondent's Fourth Amendment right in that it was conducted pursuant to an unsigned search warrant. The motion was overruled, and a motion to reconsider was filed. The motion to reconsider was overruled on the basis of the good faith exception to the exclusionary rule. (See Excerpts

from Suppression Hearing and Order Denying Motion to Suppress, Appendix.).

The respondent subsequently entered a plea of no contest and appealed his conviction raising the following assignments of error:

1. THE LOWER COURT ERRED IN DENYING THE DEFENDANTS'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN INVALID SEARCH WARRANT WHERE SAID WARRANT WAS NOT BASED ON PROBABLE CAUSE.

2. THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN UNCONSTITUTIONAL SEARCH WHERE WARRANT TO SEARCH WAS NEVER ISSUED.

The Respondent went on to elaborate his Fourth Amendment claims under his respective assignments of error. The appellate court found, based solely on the second assignment of error, that the lack of the signature on the face of the warrant prejudiced the Respondent from having a fair trial and thereby reversed the trial court's ruling on the Respondent's motion to suppress. (Appendix.)

The State appealed the appellate court's ruling to the Supreme Court of Ohio, raising the following proposition of law:

THE RATIONALE BEHIND THE EXCLUSIONARY RULE IS TO DETER POLICE MISCONDUCT, NOT TO PUNISH THE ERRORS OF MAGISTRATES AND JUDGES; THEREFORE, A SEARCH WARRANT IS NOT VOID *AB INITIO* WHERE IT IS ISSUED UPON A GOOD SHOWING OF PROBABLE CAUSE, WHERE THE AFFIDAVIT UPON WHICH PROBABLE CAUSE IS BASED IS SIGNED, AND WHERE THERE IS UNREFUTED EVIDENCE AS TO THE ISSUING MAGISTRATE'S INTENT FOR THE WARRANT TO BE EXECUTED, EVEN THOUGH THE FACE OF THE

WARRANT ITSELF LACKS THE SIGNATURE OF THE ISSUING MAGISTRATE, SUCH AN ERROR BEING AN ADMINISTERIAL OVERSIGHT ON THE PART OF THE ISSUING JUDGE.

The Respondent again responded by raising the Fourth Amendment issue. The Supreme Court of Ohio affirmed the judgement of the appellate court. (See Appendix).

STATEMENT OF THE FACTS

On July 14, 1988, Dispatcher Tim Hatfield of the Fostoria Police department received a phone call from an anonymous informant about possible illegal activity at a nearby residence. The informant, a woman, was concerned about a story that her son had told her about a large number of marijuana plants being grown by his friend's father. The informant's son had spent the night at his friend's house where he observed marijuana plants both inside the house and behind the chicken coop. The informant repeatedly expressed her desire to remain anonymous, stating that she was concerned about her well-being because "the Williams fella was either on parole or probation" and because "her son was not too far and she did not want him to know that she was calling the police department." Affiant Tim Hatfield further remarked that the informant was very sincere in answering his questions and that she had a scared tone in her voice.

Later that same day, the same woman called Dispatcher Hatfield again, stating that she had received more information from her son. She said that her son had gone to a local bar with his friend to play pool where he was again shown marijuana plants being grown outside of a window at the back of the bar. She again refused to give her name and repeated her concerns about remaining anonymous. (Appendix, Affidavit B).

As a matter of coincidence, the information conveyed by this anonymous informant corroborated other information received within the previous four weeks through a confidential informant who had a prior history of supplying information to the Fostoria Police Department. This information had proved to be accurate and had resulted in two felony drug charges

presented to Wood County Grand Jury for indictments. (Appendix, Affidavit A).

On the basis of this information, Deputy Rex Russell prepared a sworn affidavit for a search warrant the following day, July 15, 1988. Deputy Russell spoke informally with the issuing Judge William McMahon regarding the search warrant, giving the Judge the information from the two informants in conjunction with sworn affidavits from Dispatcher Hatfield and Patrolman Clark (the affiant in Affidavit A). The Judge indicated there was probable cause to support the search warrant. The Judge then signed the affidavit for the search warrant but neglected to sign the face of the warrant itself. Deputy Russell testified that he saw the Judge sign the papers that he had handed to the Judge , but couldn't recall whether or not the Judge had signed the search warrant in his presence or even if he had signed it at all. He did testify however, that after the Judge signed the papers the Judge wished him good luck and advised him to execute the search warrant as soon as possible because of a problem with "leaks" of such information on past occasions. There was never any indication from the record that Deputy Russell was aware that the face of the warrant itself had not been signed, nor was there any indication that he was reckless in the execution of the warrant. Likewise, there is no indication in the record that the Respondent was aware at the time of the search that the warrant had not been signed. The search warrant was executed that evening and the property seized was inventoried the following day. The charges underlying the Respondent's conviction resulted from incriminating evidence seized during the search.

REASONS FOR GRANTING THE WRIT

I. THE REFUSAL OF THE SUPREME COURT OF OHIO TO APPLY THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE TO THE FACTS OF THIS CASE CONFLICTS WITH THE TENOR OF DECISIONS BY THIS COURT AND DECISIONS OF LOWER FEDERAL AND STATE COURTS.

The decision of the Supreme Court of Ohio is based squarely on its understanding of what the Fourth Amendment

requires, holding, "A search warrant is void *ab initio* if not signed by a judge prior to the search." The court reached its decision for several reasons.

The first of these was consideration of a state statutory provision which constitutes a sample search warrant. (See Ohio Rev. Code § 2933.25, Appendix). This sample provision is part of a statutory scheme which embodies the substantive provisions of Ohio R. Crim. P. 41, which in turn is identical to its federal counterpart, Fed. R. Crim. P. 41, save for the federal rule's provision for oral affidavits.

The Supreme Court of Ohio further reasoned that their conclusion was necessitated by Fourth Amendment requirements, stating, *inter alia*,

> In part, the Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." *Section 14, Article I of the Ohio Constitution mirrors the Fourth Amendment.* To best effectuate these rights, knowledge that a warrant has been properly issued is essential. Without having the signature of the authorizing magistrate affixed to the warrant, a citizen is left to guess whether such a warrant has validity . . . .
>
> A signature requirement is indeed the best device for safeguarding an individual's rights as provided in the Fourth Amendment and Section 14, Article I of the Ohio Constitution . . . To protect this constitutional right, it is necessary to require the signature of the issuing judge on a search warrant prior to the search. *Williams, supra*, at 25, 26. (Emphasis added).

The Supreme Court of Ohio also relied on the decision of the Ohio Court of Appeals in *State v. Spaw*, 18 Ohio App. 3d 77, 480 N.E.2d 1138 (1984). (Appendix). *Spaw* also dealt with an unsigned search warrant. The appellate court in *Spaw* recognized the good faith exception as enunciated in *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), and as adopted by Ohio in *State v. Wilmoth*, 22 Ohio St. 3d 251, 490 N.E.2d 1236 (1986), but reasoned that the good faith exception does not apply where a search warrant lacks the judge's signature, as

"the officers here could not reasonably presume its validity." *Spaw*, at 79. Therefore it is apparent that the Ohio Court of Appeals based its decision, at least in part, on its understanding of what federal law requires. This erroneous reasoning was in turn followed by the Supreme Court of Ohio.[1]

Thus, "even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

A. The Decision Below Conflicts With Decisions Of This Court.

This Court has already recognized that the exclusionary rule should not be used to suppress evidence seized pursuant to a technically deficient warrant where the officers have acted in good faith. In *United States v. Leon*, 468 U.S. 897 (1984), this Court held, *inter alia*, that where the officers' conduct in the course of the search and seizure is objectively reasonable and executed in good faith, excluding the evidence seized because the search warrant is found to be constitutionally invalid will not further the ends of the exclusionary rule in any appreciable way. *Leon* dealt with a warrant that was ultimately determined to be invalid in that it was issued without the requisite probable cause. In upholding the search, this Court focused on the police conduct during the *execution* of the warrant and reasoned that the error committed was not that of the police in conducting the search, but was rather an error on the part of the magistrate in issuing the warrant. This court noted, "[E]ven assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as

---

1. The dissenting opinion, per Holmes, J., joined by Resnick, J., is an almost verbatim reiteration of the State's argument in its briefs on the merits.

a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 918-919.

This Court also addressed the issue of whether police should be charged with the responsibility of ensuring the warrant's technical sufficiency, stating,

> [A]n officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." [*Stone v. Powell*, 428 U.S. 465, 498 (1976).] (Burger, C.J. concurring). Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. *Id.* at 921.

Proponents of exclusion argue that supressing evidence obtained pursuant to a technically defective warrant supported by probable cause might encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. The *Leon* Court found this argument to be speculative and reasoned that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.* at 918.

Even closer to the issue here are the facts in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). In *Sheppard*, this Court upheld the search of the respondent's residence conducted pursuant to a facially deficient warrant, citing the good faith exception to the exclusionary rule. The search was to be for evidence linked to a murder, but the warrant authorized a search for controlled substances. This Court, in reaching its decision, stated in part that "the only question is whether there was an objectively reasonable basis for the officer's mistaken belief" that the warrant authorized the search that he conducted. *Id.* at 988. Clearly, in *Sheppard*, as in the case at hand, a careful examination of the warrant by the officers conducting the search would have revealed the flaw on the

warrant's face. However, unlike the officers in the instant case, the officers in *Sheppard knew* that there was a problem with the warrant's form beforehand. No such knowledge was present here. Holding the officers in the instant case to a higher standard of care than those in *Sheppard* seems inappropriate given the fact that a problem with the warrant's form here was never anticipated. The *Sheppard* Court did not consider this knowledge or lack thereof to be the controlling factor and instead elected to view the incident from the viewpoint of what the officers reasonably believed to be the scope of their authority at the time.

In light of the foregoing, the State suggests that the good faith exception finds natural application to the facts and circumstances of this case. Assuming *arguendo* that an unsigned search warrant is *per se* invalid (a point the State does not concede, *infra*), it thus needs to be considered whether the officers' reliance on the warrant was objectively reasonable. The Supreme Court of Ohio determined by inference that the officers could not have reasonably relied on a search warrant which lacked the signature of an appropriate official. Such an argument assumes that a signature was essential to the officers' subjective belief that the warrant authorized the search they had requested. It also assumes that a signature is the only possible way of ascertaining whether or not the officers' reliance was objectively reasonable. Such reasoning fails to take into consideration the circumstances surrounding the issuance of the warrant. Here, Deputy Russell witnessed the judge sign the affidavit. Whether or not the judge signed the warrant itself was not known to him at the time; however, he assumed that the judge did sign the warrant. After the judge signed the "papers," he advised Deputy Russell to carry out the search as soon as possible because of the possibility of a "leak" in the court, and even went so far as to wish the Deputy "good luck."

These facts are undisputed. Therefore, the State would suggest that what was known to the executing officers at the time needs to be considered in light of all the surrounding circumstances and a determination made as to whether they could harbor an objectively reasonable belief that their actions were authorized. The Judge at the Trial Court level did determine that the officers' belief was objectively reasonable. (Order of Common Please Court on Respondent's Motion to Reconsider and Excerpts from Suppression Hearing,

Appendix). "Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Sheppard*, at 989-990.

The instant case presents an opportunity for the Court to speak on and expand the application of the good faith exception to reasonable good faith conduct by the police -- conduct which is flawed only by a technical mistake by a neutral magistrate. The obvious importance and need for resolution of this issue to the public and to law enforcement is emphasized by the conflict between the federal courts of appeal and state courts of last resort in their attempts to resolve the issue.

B. The Decision Below Conflicts With Decisions Of Various Federal Circuit Courts of Appeals.

Aside from the good faith issue, the State submits that no substantive right of the Respondent in the case *sub judice* was violated. Nowhere does it say in the Fourth Amendment to the United States Constitution, Article I, Section 14 of the Ohio Constitution, Fed. R. Crim P. 41, Ohio R. Crim. P. 41, or Ohio Rev. Code §§ 2933.21 *et seq.* that a search warrant *must* be *signed* in order to issue. Rather, all these binding documents require the *issuance* of a search warrant.

That the signature "requirement" for search warrants is not a substantive right of a defendant or constitutionally mandated is an issue that has been explored before. In *United States v. Turner*, 558 F.2d 46 (2d Cir. 1977), the United States Circuit Court held, *inter alia*, that the signing of a search warrant is a "purely ministerial task." *Id.* at 50. The court further held that the substantive requirement of the Fourth Amendment is satisfied "[a]s long as the magistrate in fact performs the substantive tasks of determining probable cause and authorizing the issuance of the warrant. . . ." *Id.*

On the other hand, a showing of prejudice will justify suppression. *United States v. Burke*, 517 F.2d 372, 386 (2nd Cir. 1975). Such a showing is a prerequisite for exclusion in four circuits. See, *United States v. McKenzie*, 446 F.2d 949, 954 (6th Cir. 1971); *United States v. Dauphine*, 538 F.2d 1, 3 (1st Cir. 1976); *United States v. Hall*, 505 F.2d 961, 964 (3rd

Cir. 1974); *United States v. Kennedy*, 457 F.2d 63, 67 (10th Cir.), *cert. denied*, 409 U.S. 864 (1972). In *Turner, supra*, the United States Circuit Court promulgated the standard of "prejudice" to determine whether to suppress the fruits of a search. The court stated that if the defendant could show prejudice, i.e., that he was subjected to a search that, "[1] might not have occurred, or [2] would not have been so abrasive if the Rule [Fed. R. Crim. P. 41] had been followed," such a showing would justify suppression. *Turner*, at 52, quoting *Burke, supra*. As noted previously, the substantive procedures of Fed. R. Crim. P. 41 require the determination of probable cause by a neutral and detached magistrate. This procedure was followed in *Turner* and in the case at hand, pursuant to Ohio R. Crim. P. 41, which is essentially the same in substance as its federal counterpart. Since the mandates of the respective rules were followed in each case, it is hardly conceivable that the Respondent here can claim prejudice. It should also be noted that the magistrate's error here did not involve an error in judgment in determining probable cause. Yet the Supreme Court of Ohio, in affirming the decision of the Ohio Court of Appeals, found the Respondent was prejudiced and prevented from having a fair trial.

Thus, it is apparent that the decision of the Supreme Court of Ohio is in conflict with decisions of various United States courts of appeals on this Fourth Amendment issue.

C. The Decision Of The Court Below Conflicts With Decisions Of Other State Courts Of Last Resort.

In *Commonwealth v. Pellegrini*, 405 Mass. 86, 539 N.E.2d 514, *cert. denied*, ___ U.S. ___, 110 S. Ct. 497, 107 L. Ed. 2d 501 (1989), the Supreme Judicial Court of Massachusetts found that the inadvertent failure of a judge to sign a search warrant is no more than a "clerical error" that does not nullify the warrant where the judge intended to issue the warrant and where he signed the officer's affidavit (facts strikingly similar to the facts here).

In *Yuma County Attorney v. McGuire*, 109 Ariz. 471, 512 P.2d 14 (1973), an unsigned search warrant was held valid even though the state statute governing search warrants *specifically provided* that a search warrant *must be signed* in order for it to issue. The Arizona court noted that the judge's

signature on the affidavit supported the state's contention that the judge intended for the warrant to issue.

Another case which may provide direction for a decision here is *State v. Spaulding*, 239 Kan. 439, 720 P.2d 1047 (1986), wherein it was held that when a judge issues a warrant upon a finding of probable cause and intends that it be executed, but where he fails to sign the warrant itself, the court will look to the judge's intention at the time the warrant is issued.

The common theme among these cases suggests that the Fourth Amendment was designed to protect against *unreasonable* searches and seizures, and that the reasonableness of a search needs to be examined in light of the circumstances of each particular case. The evil perceived by the framers of the Constitution was not mere technical deficiencies on the face of search warrants, but the general search and seizure or the overreaching warrant. As Justice Stevens points out:

> All that our cases require is that a warrant contain a description sufficient to enable the officers who execute it to ascertain with reasonable effort where they are to search and what they are to seize. The test is whether the executing officers' discretion has been limited in a way that forbids a general search. *Leon, supra*, at 964. (Stevens, J., concurring in part, dissenting in part.)

"Since the affidavit was available for after the fact review, the . . . courts could readily ascertain the limits of the officer's authority under the warrant. *Id.* at 964. In the instant case, the affidavit upon which the warrant was issued specifically enumerated where the search was to take place and clearly stated its objectives. "[T]his search posed none of the dangers to which the Fourth Amendment is addressed. It was justified by a neutral magistrate's determination of probable cause and created no risk of a general search. It was eminently 'reasonable'." *Id.* at 966. (Stevens, J., concurring in part, dissenting in part). In the case *sub judice*, whether or not the warrant "issued" properly as required under the Fourth Amendment and not whether it was merely signed should be the pertinent question.

D. State Courts Are In Conflict Over This Issue.

Some courts have attempted to make the distinction between warrants which are merely "voidable" and those which are "void *ab initio*." E.g., *State v. Williams*, 57 Ohio St. 3d 24, 565 N.E.2d 563 (1991); *State v. Suroweicki*, 184 Conn. 95, 440 A.2d 798 (1981); *Byrd v. Commonwealth*, 261 S.W. 2d 437 (Ky. 1953); *People v. Hentowski*, 154 Mich. App. 171, 397 N.W.2d 255 (1986). In each of these cases, the courts found that technical deficiencies or clerical errors rendered the warrants void. Probable cause was not an issue. In *Leon*, however, *probable cause itself* was lacking, yet the search was upheld. In cases such as the instant case, the courts found the warrants "void", while in cases such as *Leon*, the warrant was merely "voidable".

Further, in cases such as *Williams*, the evidence seized was suppressed because of technical deficiencies in otherwise good warrants, while in *Leon* and its progeny evidence was held admissible even though the warrants were not based on probable cause. Surely, it must be correct to allow in "good" evidence seized pursuant to a technically deficient warrant where probable cause existed if in fact we allow in evidence seized pursuant to a "bad" warrant lacking in probable cause itself.

> [E]xcluding the evidence here will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty. *Leon*, at 920, quoting *Stone v. Powell*, 428 U.S. 465, 539-540 (1976). (White, J., dissenting).

"This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Leon*, at 920. "Accordingly, we believe that there should be a rule which states that evidence obtained pursuant to and within the scope of a warrant is prima facie the result of good faith on the part of the officer seizing the evidence." *Id.* at 920, n.21, quoting

the Attorney General's Task Force on Violent Crime, Final Report at p. 55 (1981).

CONCLUSION

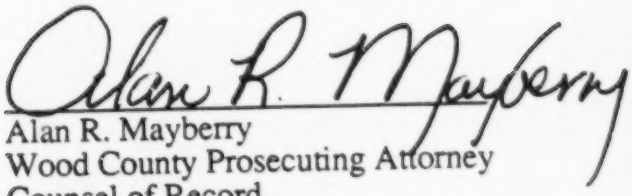
This is a matter of first impression for this Court. The Supreme Court of Ohio summarily ruled that an unsigned search warrant is void *ab initio* and failed to address the issue of the intent of the issuing magistrate or the circumstances surrounding the issuance of the warrant . The search warrant in the instant case was issued only after a good showing of probable cause. The police officers did everything in their power to obtain the warrant. Furthermore, they performed responsibly and professionally while executing the warrant and the evidence seized was probative of the criminal activities the police had suspected and which they expected to uncover upon the execution of the warrant.

There is no evidence that the police were reckless in preparing the affidavits upon which probable cause was based. The only error committed was not on the part of the police, but was that of the issuing judge. The intent of the issuing judge was clear through the testimony presented and his signing the affidavit. Exclusion in this case would do nothing to advance the interests of the Fourth Amendment; therefore, the search in this case should be upheld.

While a judge's signature on the face of the warrant may be a factor in determining whether or not the judge intended for the warrant to issue, it should not be the ultimate element nor the only means by which a determination can be made. The State is in no way suggesting that a signature is never necessary, or that warrants should routinely issue without signatures, or even that it is "O.K." for warrants to sometimes issue without the issuing magistrate's signature. Such an oversight is a mistake on the part of the issuing judge. However, what the State is suggesting is that suppression in cases where the executing officers act in reasonable reliance on what they believe to be a validly issued warrant would not serve the interests of the Fourth Amendment.

For all of the foregoing reasons, the State of Ohio respectfully requests this Court to grant the petition for the writ of certiorari to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,



Alan R. Mayberry
Wood County Prosecuting Attorney
Counsel of Record
One Courthouse Square
Bowling Green, Ohio 43402
(419) 354-9250

APPENDIX

APPENDIX INDEX

State v. Williams, 57 Ohio St.3d 24, 565 N.E.2d 563 (1991) 21

State v. Williams, CA. No. WD-89-30 (6th Dist. Ct. App., Wood County, 11-17-89) Unreported 31

Search Warrant 35

Search Warrant Affidavit 37

Affidavit A 43

Affidavit B 45

Return of Search Warrant 47

State v. Spaw, 18 Ohio App.3d 77, 480 N.E.2d 1138 (1984) 49

Excerpts from Suppression Hearing 55

Judgments, Orders, and Journal Entries of Case as Rendered in the Court of First Instance 57-62

Statutory Provisions 63-71

28 U.S.C. § 1257 (a) 63

Ohio Rev. Code §§ 2933.21 et seq.....63-66

Ohio R. Crim. P. 41.....66

Fed. R. Crim. P. 41.....68

SUPREME COURT, JANUARY TERM, 1991
Opinion, per Douglas, J.

THE STATE OF OHIO, APPELLANT,
v.
WILLIAMS, APPELLEE

[Cite as *State v. Williams* (1991), 57 Ohio St. 3d 24.]

Criminal law --Search and seizure--Search warrant is void ab initio if not signed by a judge prior to the search.

O.Jur 3d Criminal Law §§ 521, 525.
A search warrant is void *ab initio* if not signed by the judge prior to the search.

(No. 89-2204--Submitted September 19, 1990--Decided January 9, 1991.)

APPEAL from the Court of Appeals for Wood County, No. WD-89-30.

On July 16, 1988, Larry E. Williams, appellee, was arrested and subsequently indicted for trafficking in marijuana, a violation of R.C. 2925.03. Appellee was charged based upon evidence obtained during a search of his home. A search warrant was issued for the search; however, the warrant was never signed by the issuing judge.

Prior to trial, appellee moved to suppress evidence obtained in the search. That motion was overruled. Subsequently, appellee withdrew his former plea of not guilty and entered a plea of no contest to the charges against him. Appellee was convicted and, thereafter, appealed his conviction.

The court of appeals reversed and remanded. The appellate court determined that the search warrant was void *ab initio* and held that all evidence seized in the search of the appellee's home should be suppressed.

This cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Alan R. Mayberry, prosecuting attorney, *David E. Woessner* and *Jeffrey P. Nunnari*, for appellant.

John P. Duffin, county public defender, for appellee.

Douglas, J. The issue presented to this court is whether a search warrant is void *ab initio* when the face of the document lacks a judge's signature. We find that it is. Therefore, any evidence obtained pursuant to such a search warrant must be suppressed.

The issue of whether a search warrant is void if not signed by a judge prior to a search was addressed by the court in *State v. Spaw* (1984), 18 Ohio App. 3d 77, 18 OBR 242, 480 N.E. 2d 1138. In *Spaw*, evidence was obtained in a search of the defendant's car. The search warrant authorizing the search had not been signed by the judge prior to that search. The court determined that the evidence obtained should be suppressed because the search warrant was defective. *Id.* at 79, 18 OBR at 244, 480 N.E. 2d at 1140. The court reasoned that "* * * what otherwise purports to be a search warrant is not a search warrant when it lacks any signature at all, and the officers here could not reasonably presume its validity. It never acquired the status of being merely voidable but did not exist as a warrant and was void *ab initio*." *Id.* at 79, 18 OBR at 244, 480 N.E.2d at 1140.

This issue is one of first impression for this court. We recognize that some other jurisdictions have held an unsigned search warrant valid when the intent to sign was clear. Such courts have held, absent any statutory provision such as R.C. 2933.25, that where the judge's failure to sign is only a "mere oversight", the search warrant will not be found to be invalid. See, *e.g., Yuma Cty. Attorney v. McGuire* (1973), 109 Ariz. 471, 512 P.2d 14; *State v. Spaulding* (1986), 239 Kan. 439, 720 P.2d 1047. However, we believe the better view is that expressed in *Spaw*, that a search warrant is void *ab initio* if not signed by a judge prior to the search.

We reach our decision for several reasons. Search warrants are issued pursuant to the authority found in R.C. 2933.21 and Crim. R. 41. R.C. 2933.25 dictates the form of a search warrant.[1] Included in the example form is the issuing

judge's signature. Further, R.C. 2933.24(A) provides that "* * * [s]uch warrant *shall command* the officer to search such house or place or person named or described for the property or other things * * *." (Emphasis added.) A command without a known commander cannot be a command.

Indeed, the Supreme Court of Connecticut has recognized that a lawful signature on a search warrant, by the person authorized to issue it, is essential to its issuance. *State v. Surowiecki* (1981), 184 Conn. 95, 440 A. 2d 798. The court in *Surowiecki* concluded that a search warrant, which had been used to obtain evidence necessary for the defendant's arrest and which had not been signed by a judge prior to the search, did not issue under Connecticut law. *Id.* at 97, 440 A. 2d at 799. The court reasoned that only when the judge had affixed his signature to the search warrant would the search warrant be said to have been issued. *Id.* The signing of a search warrant is the only identifiable objective manifestation of judge's subjective intent to issue a search warrant.

In part, the Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." Section 14, Article I of the Ohio Constitution mirrors the Fourth Amendment. To best effectuate these rights, knowledge that a warrant has been properly issued is essential. Without having the signature of the authorizing magistrate affixed to the warrant, a citizen is left to guess whether such a warrant has validity.

In *People v. Hentkowski* (1986), 154 Mich. App. 171, 397 N.W. 2d 255, the court recognized several important reasons for requiring the signature of the issuing judge on a search warrant. The fact scenario in *Hentkowski* parallels that in the case at the bar. The defendant in *Hentkowski* was convicted of two counts of possession of an illegal substance based on evidence obtained in a search of his home. The search was conducted pursuant to a search warrant which had never been signed by a magistrate prior to the search. In reversing the defendant's convictions for possession, the Michigan court of appeals held that "* * * an unsigned search warrant is necessarily invalid." *Id.* at 179, 397 N.W. 2d at 259. The court determined that the signature allows one to distinguish between and actual warrant and one that is legally unenforcable. *Id.* at 177, 397 N.W. 2d at 258. Further, the

signature requirement provides both protection and assurance to property owners faced with the threat of a search of their property, in that they may review the document and determine whether or not they are required to allow officers to conduct the search. *Id.* at 179, 397 N.W. 2d at 259.

A signature requirement is indeed the best device for safeguarding an individual's rights as provided in the Fourth Amendment and Section 14, Article I of the Ohio Constitution. Signature requirements have long been recognized as fulfilling cautionary functions in protecting an individual's rights. As examples, in Ohio, we have signature requirements for wills and the transfer of real property. For an interest in land to be conveyed, Ohio law requires a writing signed by the party (or his agent) granting the interest conveyed. R.C. 1335.04. Also, a will (except an oral will) is invalid unless it is in writing and signed by the maker or another individual at the maker's direction. R.C. 2107.03. Certainly, the protection of one's right as guaranteed by the United States Constitution and the Constitution of this state to be free from unreasonable searches and seizures should not be granted any less protection than that afforded to property rights. To protect this constitutional right it is necessary to require the signature of the issuing judge on a search warrant prior to the search.

Accordingly, we hold that a search warrant is void *ab initio* if not signed by a judge prior to the search. Evidence seized pursuant to such an invalid warrant must be suppressed.

The judgement of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY and H. BROWN, JJ., concur.

WRIGHT, J., concurs in judgment only.

HOLMES and RESNICK, JJ., dissent.

HOLMES, J., dissenting. I must dissent in that I strongly disagree that all search warrants which do no have the issuing judge's signature thereon are void *ab initio*. I do agree with the majority that better policy would dictate that the issuing judge's signature be placed upon the search warrant. However, there are instances when a strict adherence to such policy results in the "baby being thrown out with the bath

water." All the facts in this matter, including the affidavit of Deputy Russell for the procurance of the search warrant which was signed by the judge who issued the warrant, show that the warrant was knowingly issued by the judge based upon probable cause, and executed properly by the deputy sheriff who had obtained the warrant.

The background facts which occasioned the warrant are briefly that an informant contacted the Fostoria Police Department on two occasions concerning marijuana-growing activities within her immediate knowledge. This information corroborated prior information from another informant who had previously worked with that police department. Deputy Russell, on the basis of such information, prepared a sworn affidavit for a search warrant and spoke with the judge about issuing the warrant. The judge agreed that there was probable cause to issue the warrant and acknowledged Deputy Russell's signature upon the affidavit. Although signing the affidavit, the judge overlooked placing his signature upon the face of the search warrant as issued.

Both the affidavit seeking the search, and the warrant, specified the property of the defendant, Larry E. Williams, that was to be searched for and seized, and that was "[m]arijuana plants, growing paraphernalia, and any equipment relative to the cultivation, manufacture, or engagement in any part of the production of any controlled substance."

Deputy Russell testified that he saw the judge sign the papers that he had handed to the judge, but could not recall whether or not the judge had signed the search warrant in his presence or even if he had signed it at all. He did testify, however, that after the judge signed the papers the judge wished him good luck and advised him to execute the search warrant as soon as possible because of a problem with "leaks" of such information on past occasions.

The search warrant was executed the next morning without any indication in the record that the search was conducted in any other than a proper manner. The property was seized and inventoried including growing marijuana plants, bagged marijuana plants, potted marijuana plants, a marijuana seed catalog, a marijuana leaf-style belt buckle, and many other marijuana growing and utilization paraphernalia. Williams was charged with and convicted of the possession of such materials.

It is my position that this warrant should be upheld, and the property held to be properly seized and not subject to suppression upon two bases. First, in that it has been clearly shown that the issuing judge had intended to command the search by acknowledging the affidavit of the procuring officer, this warrant was valid from its inception. Second, ministerial oversights, as here, should not void otherwise proper warrants and hold for naught the good faith efforts of a law enforcement officer who had properly and lawfully executed the authorization of such search warrant.

While the absence of a judge's signature on the face of a search warrant may be a factor in determining whether or not the judge intended for the warrant to issue, it should not be considered the only element by which such determination is made. Such an absence of a signature may be, as here, an oversight upon the part of the judge, and suppression in such instances where the executing officer acted in reasonable reliance upon what he believed to be a validly issued warrant would not serve in the best interests of the Fourth Amendment. Such was the conclusion of the United States Supreme Court in *United States v. Leon* (1984), 468 U.S. 897, where the court stated: "[A]s cases considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule's deterrent value that 'anything which deters illegal searches is thereby commanded by the Fourth Amendment.'" *Id.* at 910. Applying the good-faith-of-the-officer rule, the court stated that "* * * [p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 921.

Ohio adopted the good faith exception in *State v. Wilmoth* (1986), 22 Ohio St. 3d 251, 22 OBR 427, 490 N.E. 2d 1236. In *Wilmoth*, this court held, at paragraph two of the syllabus, that "[w]here the officer's conduct in the course of the search and seizure is objectively reasonable and executed in good faith, excluding the evidence seized because the search warrant is found to be constitutionally invalid will not further the ends of the exclusionary rule in any appreciable way." *Wilmoth* dealt with a search warrant issued on an oral affidavit, contrary to the requirements of Crim. R. 41(C), and where the officers did not testify under oath as required by the United States Constitution and the Ohio Constitution. In upholding the

search, this court focused on the police conduct during the *execution* of the warrant and correctly reasoned that the error committed was not that of the police in conducting the search, but rather was an error on the part of the magistrate in issuing the warrant. This court noted: " 'An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake.' * * * Enforcement of the exclusionary rule suppressing evidence as a result of error by a magistrate can never deter future police misconduct." (Emphasis deleted.) *Id.* at 266, 22 OBR at 439-440, 490 N.E. 2d at 1247-1248.

In reaching its conclusions in *Wilmoth*, this court relied heavily on the language of *Leon, supra,* and stated at 265, 22 OBR at 439,490 N.E. 2d at 1247, that "ordinarily it is not the responsibility of the officer to question the probable cause determination made by the magistrate or whether the warrant is technically deficient."

When applying the principles enumerated in *Leon*, the determination of whether or not exclusion is an appropriate remedy involves a two-step inquiry. The first step deals with whether or not a valid search warrant existed. If so, the good faith issue need not be considered. If, however, this first question is answered in the negative, then it needs to be determined if the good faith exception, in light of the facts and circumstances of the particular case, can be appropriately applied. See *Wilmoth, supra.*

There is no "signature requirement" for search warrants provided by statute in Ohio, by Constitution or by rule, and such signature must be considered as only ministerial in nature.Therefore an unsigned warrant, *per se*, does no violence to a substantive right of the defendant. Although the Constitution and the statutes do not specifically require such a signature, the majority here mandates such a signature to validate an otherwise proper warrant and search pursuant thereto.

That the signature "requirement" for search warrants is not a substantive right of a defendant or constitutionally mandated is an issue that has been explored before. In *United States v. Turner* (C.A.2, 1977), 558 F. 2d 46, the United States Circuit Court of Appeals held, *inter alia*, that the signing of a search warrant is a "purely ministerial task." *Id.* at 50. The court further held that the substantive requirement of the Fourth

Amendment is satisfied '[a]s long as the magistrate in fact performs the substantive tasks of determining probable cause and authorizing the issuance of the warrant * * *." *Id.*

In *Commonwealth v. Pellegrini* (1989), 405 Mass. 86, 539 N.E.2d 514, the Supreme Judicial Court of Massachusetts found that the inadvertent failure of a judge to sign a search warrant is no more that a "clerical error" that does not nullify the warrant where the judge intended to issue the warrant and where he signed the officer's affidavit (facts strikingly similar to the facts here).

In like manner, in *State v. Spaulding* (1986), 239 Kan. 439, 720 P.2d 1047, it was held that when a judge issues a warrant upon finding of probable cause and intends that it be executed, but where he fails to sign the warrant itself, the reviewing court will look to the judge's intention at the time the warrant is issued.

In a number of jurisdictions, a showing of prejudice to the defendant is necessary in order to suppress the evidence where the warrant was obtained and executed in good faith. *United States v. Burke* (C.A.2, 1975), 517 F.2d 377; *United States v. McKenzie* (C.A.6, 1971), 446 F.2d 949; *United States v. Turner, supra.* The common thread which runs through these cases is to the effect that the Fourth Amendment was designed to protect against *unreasonable* searches and seizures, and that the reasonableness of a search needs to be examined in light of the totality of the circumstances of each case.

The search warrant in the instant case was issued only after a good showing of probable cause. The law enforcement officers did everything in their power to obtain the warrant. Furthermore, the deputies performed responsibility and professionally while executing the warrant and the evidence seized was highly probative of the criminal activities the officers had suspected and which they had hoped to uncover upon the execution of the warrant. There is no evidence that the officers were reckless in preparing the affidavits upon which probable cause was based. The only error committed was not on the part of the officers, but was that of the issuing judge. The intent of the issuing magistrate is clear through the testimony presented and the signing of the affidavit. Exclusion in this case would do nothing to advance the interests of the Fourth Amendment, nor would such suppression serve to advance the best interests of the judicial

process, or serve the interests of the general public in abating crime; therefore, the search in this case should be upheld.

On the basis of all the foregoing commentary, I would reverse the judgment of the court of appeals.

RESNICK, J., concurs in the foregoing dissenting opinion.

---

[1]R.C. 2933.25 provides, with emphasis added:

"Warrants issued under section 2933.21 of the Revised Code shall be substantially in the following form:

"State of Ohio, ...County, ss:

"To the sheriff (or other officer) of said County, greeting:

"Whereas there has been filed with me an affidavit, of which the following is a copy (here copy of the affidavit).

"There are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter in the daytime (or in the nighttime) into (here describe the house or place as in the affidavit) of the said . . . . . township of . . . . . in the County aforesaid, and there diligently search for the said goods and chattels, or articles, to wit: (here describe the articles as in the affidavit) and that you bring the same or any part thereof, found on such search, and also the body of E.F., forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to the law.

"Given under my hand, this . . . . . day of . . . . . .

"A.B., Judge, County Court"

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF WOOD

C. A. NO. WD-89-30

State of Ohio	APPEAL FROM
APPELLEE	WOOD COUNTY COMMON PLEAS COURT
-VS-	NO. 88-CR-329
Larry E. Williams	
APPELLANT	DECISION AND JOURNAL ENTRY

DATE November 17, 1989

This case is an appeal from appellant's conviction for violation of R.C. 2925.03. He asserts two assignments of error as follows:

"FIRST ASSIGNMENT OF ERROR
THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN INVALID SEARCH WARRANT WHERE SAID WARRANT WAS NOT BASED ON PROBABLE CAUSE.

"SECOND ASSIGNMENT OF ERROR
THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN UNCONSTITUTIONAL SEARCH WHERE WARRANT TO SEARCH WAS NEVER ISSUED."

Procedurally, appellant was arrested and ultimately indicted for violation of R.C. 2925.03. He filed a motion to suppress evidence seized pursuant to a purported search warrant. Following a hearing, said motion was denied.

Thereafter, appellant pled no contest, consented to a finding of guilty, and was sentenced accordingly. This appeal followed.

The court first considers appellant's Assignment of Error No. 2. He alleges that the search warrant in question was a nullity in that it lacked the signature of the issuing magistrate and cites the case of *State v. Spaw* (1984), 18 Ohio App. 3d 77, in support of his position. Appellee acknowledges in its brief and in oral argument the existence of this authority but suggests that *State v. Spaw* does not speak to the issue of the judge's intent when determining whether or not to issue a search warrant and further argues that evidence of said intent should be considered in light of *United States v. Leon* (1984), 468 U.S. 897. Appellee argues that the good faith exception enunciated in *Leon* should be considered together with the evidence of the judge's intent, to allow the search warrant to stand in this case.

This court has considered the record and the existing law and finds that the rationale of *State v. Spaw* is compelling to a resolution of this case. In the syllabus of the *Spaw* case, the Court of Appeals for Defiance County stated:

> "A search warrant issued without the signature of either the judge who issued the warrant or the clerk of court, and which lacks any signature at all, is void *ab initio*, and the fruits of such a warrant will be suppressed."

We find the rationale of the *Spaw* case to be controlling in this instance. Appellant's second assignment of error is found well-taken.

Having found the second assignment of error well-taken, it is unnecessary to address the matters raised in appellant's first assignment of error. It is therefore found moot and not well-taken.

On consideration whereof, the court finds that the defendant was prejudiced and prevented from having a fair trial, and the judgment of the Wood County Court of Common Pleas is reversed. This cause is remanded to said court for further proceedings not inconsistent with this decision. It is ordered that appellee pay the court costs of this appeal.

Peter M. Handwork, P.J.

John J. Connors, Jr., J.

Charles D. Abood, J.
CONCUR.

PUBLISHER'S NOTE

THE FOLLOWING PAGES ARE UNAVAILABLE FOR FILMING:

34 thru 48

THE STATE OF OHIO, APPELLANT,
v.
SPAW, APPELLEE.

THE STATE OF OHIO, APPELLANT,
v.
NOLAN, APPELLEE.

[Cite as State v. Spaw (1984),
18 Ohio App. 3d 77.]

Criminal law --Search and seizure-- Warrant containing no signature at all void ab initio -- Motion to suppress sustained.

O.Jur 3d Criminal Law § § 521, 525.

A search warrant issued without the signature of either the judge who issued the warrant or the clerk of court, and which lacks any signature at all, is void *ab initio,* and the fruits of such a warrant will be suppressed.

(Nos. 4-83-19 and -20--Decided November 14, 1984.)

APPEAL: Court of Appeals for Defiance County

Stephen W. Ruyle, for appellant.

Wyss, Mochamer, Roby, Ryan & Myers, Harold W. Myers and Gregory M. Antalis, for appellees.

GUERNSEY, J. These appeals by the state of Ohio are from judgments rendered by the Court of Common Pleas of Defiance County suppressing evidence seized by police authorities after search of a motor vehicle under the purported authority of search warrants issued out of the trial court.

The vehicle, of which ownership was not claimed by either of the defendants, was, prior to its impoundment and the search and seizure following impoundment, driven by the defendant Lee E. Nolan with the defendant Jerry L. Spaw as a passenger. Neither Nolan nor Spaw claimed ownership of the personal property, consisting of alleged burglary tools, as well as other property, seized after the search. Each of the defendants moved for the suppression of this evidence on various grounds. After a common hearing of the motions the

trial court rendered its judgments from which these appeals were taken, each in the following pertinent words:

"This matter was heard upon the motion of the defendant to suppress evidence seized under authority of a search warrant.

"The first objection to the search arises from defendant's claim that the search warrant did not contain the signature of the Judge who issued the search warrant, nor by the Clerk of Court.

"While it is permissible for the Clerk to issue a search warrant upon order of the Judge, *State v. Kuykendoll* (1977), 51 Ohio App. 2d 215 [5 O.O.3d 354], a search warrant issued without the signature of the Judge or the Clerk is clearly invalid. Here, neither the Judge nor the Clerk signed the search warrant itself. Therefore the Court finds the search warrant invalid and orders the items seized under authority of the warrant be suppressed.

"The Court further finds that the state's claim that the items seized should be admitted because the officer had probable cause to search the vehicle at the time of the arrest, must also fail. The evidence indicates that the vehicle was towed to a garage without an inventory being made of the contents. It was only later that it was searched under authority of an invalid search warrant. After a vehicle has been taken to a garage for safe-keeping, a valid search warrant is necessary. *State v. Bernius* (1964), 177 Ohio St. 155 [29 O.O.3d 359], and *Ohio v. Waldbillig* (1964), 1 Ohio st. 2d 50 [30 O.O.2d 28].

"Having found the search to be invalid due to defects in the search warrant, the Court will not discuss nor act upon the other claims of defendant."

The following assignment of error is common to both appeals:

"Defendant charged with crimes of possession may claim the benefits of exclusionary rule only if their [*sic*] own 4th amendment rights have in fact been violated. Where defendant claims no ownership or possessory interest either in the place searched or the items seized the defendant is not entitled to claim the benefits of the exclusionary rule. The trial court erred when granting defendant's motion to suppress where the defendant asserted neither ownership nor possessory interest in the place searched or items seized."

Although this might have been a valid claim if properly raised, it is clear from the trial court's judgment that it elected neither to "discuss nor act upon" this claim by the state, in the same manner as it refrained from discussing or acting upon the other claims of defendant. In any event, examination of the record, including the transcript of the hearing proceedings on the motion to dismiss, discloses that this claim by the state as to the lack of standing on the part of the defendants to contest the seizure was never raised by the state in the trial court.

Accordingly, the issue attempted to be raised by the state under this assignment of error has not been preserved for review by this court and, for such reason, we find this assignment of error, as to each appeal, to be without merit.

In the appeal of the *Nolan* case the state assigns as a second assignment of error:

"When an affidavit in support of a request for a search warrant, is executed properly by the previously sworn officer, in the presence of the reviewing judge, and signed by such judge, and when such judge executes a journal entry requiring the issuance of a search warrant, but further the issuing judge fails to execute the original search warrant, such failure is a ministerial oversight, and should not be fatal to the warrant intended to be issued."

The state's only argument for this position is that such error is merely ministerial in nature, which, under the authority of *United State v. Wyder* (C.A. 6, 1982), 674 F.2d 224, does not invalidate the search warrant. However, in that case the defect considered in the search warrant was a misstatement that the search under the warrant must be completed within five hours, rather than within five days. The warrant had been properly issued in all other respects and the appellate court regarded the defect insignificant and not sufficient to void the warrant.

Here, the trial court held the search warrant issued without the signature of either the "Judge" or the "Clerk" clearly invalid. In essence it said that the document did not constitute a search warrant *ab initio*. As to this, we agree.

Crim. R. 41 prescribes as to search warrants:

"(A) A search warrant authorized by this rule may be issued *by a judge of a court of record* * * *." (Emphasis added.)

"(C) * * * If the judge is satisfied that probable cause for the search exists, *he shall issue a warrant* * * *." (Emphasis added.)

"(D) * * * Property seized under a warrant shall be kept for use as evidence *by the court which issued the warrant* * * *." (Emphasis added.)

"(E) The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk."

We are fully familiar with the recent decisions of the Supreme Court of the United States in the cases of *United States v. Leon* (1984), 82 L.Ed.2d 677, and *Massachusetts v. Sheppard* (1984), 82 L.Ed.2d 737, wherein it was held, respectively, notwithstanding that probable cause for the issuance of a search warrant did not exist, "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause" (82 L.Ed.2d at 700-701), and, where police officers, who were advised by a judge that all necessary clerical changes had been made in a defective warrant form, took every step that could reasonably be expected of them, there was an objectively reasonable basis for their mistaken belief that the search warrant authorized the search which the officers conducted, and the exclusionary rule would not be applied since the officers acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate which subsequently was determined to be invalid.

In the former of these cases the Supreme Court emphasized that the purpose of the exclusionary rule is the deterrence of illegal conduct on the part of the police officials and that when the warrant is facially valid, and their conduct is objectively reasonable, the fruits of the warrant will not be suppressed. The court additionally pointed out that it has expressed a strong preference for warrant searches and had declared that "'in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.'" 82 L.Ed.2d at 693. It likewise recognized at 699:

"* * * Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient * * * that

the executing officers cannot reasonably presume it to be valid." 79 Corpus Juris Secundum (1952) 776, Searches and Seizures, Section 1, defines "search warrant":

"* * * to be an order in writing in the name of the state, *signed by a magistrate* and directed to a peace officer, commanding him to search for personal property and bring it before the magistrate." (Emphasis added.)

See, also, *Kovacs v. State* (1921), 24 Ohio N.P. (N.S.) 1, 2, which would also permit signature by the court clerk.

In our opinion, what otherwise purports to be a search warrant is not a search warrant when it lacks any signature at all, and the officers here could not reasonably presume its validity. It never acquired the status of being merely voidable but did not exist as a warrant and was void *ab initio*. Moreover, with such defect being readily apparent on the face of the instrument it cannot be said that the officers exercising the "warrant" acted in good faith.

Accordingly, we find the second assignment or error in the *Nolan* case not well-taken.

Having found no error prejudicial to the state of Ohio, appellant herein, in either the *Spaw* case or the *Nolan* case, the judgments of the trial court suppressing as evidence the personal property seized by the execution of the void search warrant are hereby affirmed and the two causes are remanded to the trial court for further proceedings as are provided by law.

Judgments affirmed.

MILLER, P.J., and COLE, J., concur.

Excerpts from Suppression Hearing

MR. DUFFIN, (Counsel for Respondent): There is also, then, I think another problem with this process in that the search warrant perhaps was never issued, in that there is no search warrant that has been executed by Judge McMahon for whom, and in front of whom this affidavit for search warrant was presented. I think that is a problem borne out on the first page of the Joint Exhibit that is presented to the court which is, in fact, the search warrant itself, which has to, of course, pursuant to the Fourth Amendment and Ohio Constitution, and Criminal Rule 41, has to be issued by an independent neutral magistrate. If there is a warrant that has not been issued, then, of course, I think that this becomes a warrantless search, and those issues then shift the burden to the state of Ohio to prove that this warrantless search was done within a proper exception to the Ohio and United States Constitution.

Thank you judge.

(R. pp. 9-10)

* * *

THE COURT: The Court will then decide based on what it has. The present state of the evidence would indicate to the court that there was an intent, and by error or accident or by loss of the original, the court did, in fact, intend to issue a search warrant and the court, because of that reason, taking into account the intimate contact between the officers and the judge, the fact that an inventory was, in fact, filed relative to that, and considering the crux of the argument of counsel for the defense relative to the sufficiency, the court first of all finds that there was intent to issue the search warrant and so, therefore, overrules the defendant's argument that because the signature on the search warrant, in fact, does not show up on this copy, that the error would be an error which was caused by accident or other inadvertence, and therefore would be insufficient to overcome the factual basis that he intended to execute it and is was, therefore, valid.

From that viewpoint, likewise, then, dealing with the affidavit as to the sufficiency, the court would believe that based on what it has before it, that the totality of the

circumstances in this case would, in fact, justify the issuance of a warrant by Judge McMahon, and therefore would overrule the motion to suppress in this case.

MR. WOESSNER: Thank you, your Honor.

MR. DUFFIN: Thank you, judge.

THE COURT: Thank you gentlemen.

(Court adjourned.)
(R. pp. 36-37).

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,
Plaintiff

CASE NO. 88-CR-329

vs

Decision

Larry Williams
Defendant.

November 17, 1988

This cause was before the Court on November 17, 1988 for hearing on Defendant's motion to suppress. Present were David Woessner, Assistant Prosecuting Attorney, for the State and the Defendant with his counsel John P. Duffin, Esq.

The Court heard the testimony of one witness after which the Court ruled that the motion to suppress was not well taken and should therefore be overruled.

Counsel for defendant further made a motion to suppress certain items found on the inventory sheet as the items were outside the scope of the warrant.

The Court found that this matter should be addressed as a motion in limine prior to trial in this case.

It is therefore Ordered, Adjudged and Decreed that defendant's Motion to Suppress is hereby Overruled. This case continued for jury trial.

Judge Donald A. DeCessna

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,
Plaintiff

vs

Larry Williams
Defendant.

CASE NO. 88-CR-329

Order

Judge Donald A. DeCessna

December 21, 1988

* * * * * * * * * * *

This cause was before the Court on Defendant's motion to reconsider Defendant's motion to suppress. The State has filed a response to the motion to reconsider.

Upon review of the motion, the response and the law applicable thereto the Court finds that evidence adduced at the suppression hearing showed that the issuing magistrate intended to issue the search warrant and that the officers, from discussion with the Judge, acted in reasonable reliance that the search warrant had indeed been issued and was valid.

Therefore under the authority of *United States v. Leon*, (1984), 82 L.Ed.2d 677, it is hereby Ordered, Adjudged and Decreed that the motion to reconsider is not well taken and is hereby over-ruled.

Judge Donald A. DeCessna

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio, CASE NO. 88-CR-329

Plaintiff, JUDGE DONALD A. DECESSNA

-vs- JUDGMENT ENTRY OF CONVICTION

Larry Williams,

Defendant. December 21, 1988

This cause was was called on February 21, 1989, for plea. Present were David Woessner, Assistant Prosecuting Attorney, for the State, and the Defendant with his attorney, John P. Duffin.

As the result of agreement by counsel for the State and the Defense stated on the record in open Court, the Defendant moved to change his plea to Count 1 of the indictment, having waived the service and reading in open Court. The Defendant withdrew his former plea of not guilty and entered his plea of no contest in open Court, to the charge of Trafficking in Marihuana, a violation of R.C. Section 2925.03, a felony of the third degree.

The Defendant's attorney stated that he personally advised Defendant of his constitutional rights, the consequences of the plea, and penalty, as provided by Criminal Rule 11.

Thereafter, the Court addressed the Defendant personally and advised him of his constitutional rights, the consequences of the plea, and penalty, as provided by Criminal Rule 11.

The Defendant, in open Court, in writing, waived his right to trial by jury and signed the petition to plead no contest with a consent to a finding of guilty and plea of no contest with consent to a finding of guilty to the charge of Trafficking in Marihuana, a violation of R.C. Section 2925.03, a felony of the third degree.

The Court then informed the Defendant of the effect of the plea of no contest as required by Criminal Rule 11 (B) and read and reviewed the petition to enter a plea of no contest with a contest to a finding of guilty with the defendant.

The Court then determined from the Indictment that there is a factual basis for the plea of no contest and the plea of no

contest was accepted and the Defendant was adjudged guilty of Trafficking in Marihuana, a violation of R.C. Section 2925.03, a felony of the third degree.

IT IS THEREFORE ORDERED AND JUDGMENT RENDERED that the Defendant is convicted of the crime of Trafficking in Marihuana and this case is referred for a pre-sentence investigation, the amount of bond being continued at Defendant's own recognizance, the prosecution having no objection. Defendant to be present for sentencing on March 27, 1989 at 2:30 P.M. Bond to continue during pendancy of appeal.

A copy of this judgment entry of conviction to counsel of record, Adult Probation Department, and the Wood County Sheriff.

Donald A. DeCessna
Judge

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio, CASE NO. 88-CR-329

Plaintiff, JUDGE DONALD A. DECESSNA

-vs- JUDGMENT ENTRY OF SENTENCE

Larry Williams,

Defendant. April 14, 1989

On April 14, 1989, case was called for sentencing pursuant to Criminal Rule 32. Present were David E. Woessner, Assistant Prosecuting Attorney, for the State, and the Defendant, with his attorney, John P. Duffin; the Court having received the pre-sentence report of the Wood County Adult Probation Department.

The Court proceeded under Criminal Rule 32 (A) (1) and statements were received by counsel for the Defendant, the Defendant, and the Prosecuting Attorney. State made no recommendation.

Upon consideration of the matters set forth in R.C. Section 2929.12, Section 2951.02, and other matters pertinent to the sentence which should be imposed, it is,

ORDERED AND JUDGMENT RENDERED by the Court that for the offense of Trafficking in Marihuana, a violation of R.C. Section 2925.03, a felony of the third degree, the Defendant is sentenced to the Ohio Department of Corrections and Rehabilitation and that the Defendant be imprisoned and confined therein for a definite term of one and one-half (1-1/2) years; and a mandatory $4,500 fine.

After determining Defendant to be indigent and unable to pay the statutory fine, the Court suspended the fine under the provisions of R.C. Section 2925.03 (L).

Defendant, having previously entered a no contest plea, was advised of his rights regarding appeal under Criminal Rule 32 (A) (2). Defendant, through counsel, stated his desire to appeal and John P. Duffin was appointed for appeal purposes. A stay of execution of sentence was granted pending appeal.

It is also ordered that the Defendant pay the costs of this prosecution and that the bond be continued pending appeal.

Pursuant to R.C. Section 2967.191 and R.C. Section 2949.12, according to the Wood County Sheriff's Department, the Defendant has not been incarcerated in the Wood County Jail, to the date of sentencing.

A copy of this judgment entry of sentence to counsel of record, Adult Probation Department, Adult Parole Board, and the Wood County Sheriff.

Donald A. DeCessna
Judge

STATUTORY PROVISIONS

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Ohio Rev. Code § 2933.21 Search warrant.

A judge of a court of record may, within his jurisdiction, issue warrants to search a house or place:

(A) For property stolen, taken by robbers, embezzled, or obtained under false pretense;

(B) For weapons, implements, tools, instruments, articles or property used as a means of the commission of a crime, or when any of the objects or articles are in the possession of another person with the intent to use them as a means of committing crime;

(C) For forged or counterfeit coins, stamps, imprints, labels, trade-marks, bank bills, or other instruments of writing, and dies, plates, stamps, or brands for making them;

(D) For obscene materials and materials harmful to minors involved in a violation of section 2907.31 or 2907.32 of the Revised Code, but only so much of such materials shall be seized as are [is] necessary for evidence in a prosecution of the violation;

(E) For [any] gaming table, establishment, device, or apparatus kept or exhibited for unlawful gaming, or to win or

gain money or other property, and for money or property won by unlawful gaming;

(F) For the existence of physical conditions which are or may become hazardous to the public health, safety, or welfare, when governmental inspections of property are authorized or required by law.

The enumeration of certain property and material in this section shall not affect or modify other laws for search and seizure.

Ohio Rev. Code § 2933.22 Probable cause.

(A) A warrant of search or seizure shall issue only upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the property and things to be seized.

(B) A warrant of search to conduct an inspection of property shall issue only upon probable cause to believe that conditions exist upon such property which are or may become hazardous to the public health, safety, or welfare.

Ohio Rev. Code § 2933.23 Affidavit for search warrant.

A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

Ohio Rev. Code § 2933.24 Contents of search warrant; report of inspection findings.

(A) A warrant for search shall be directed to the proper officer, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite all the material facts alleged in the affidavit, and particularly describe the things to be searched for, the house or place to be searched, and the person to be searched and seized. Such warrant shall command the officer to search such house or place or person named or described for the property or other things, and to bring them, together with the person to be seized, before the judge or magistrate. The command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search in the night in which case a search in the night may be ordered. Such search warrant shall be returned by the officer holding the same not later than three days after issuance. It shall designate the judge or magistrate to whom it shall be returned, if such judge is available.

(B) When a warrant to search commands a proper officer to inspect physical conditions relating to public health, safety, or welfare, such officer, upon completion of the search, shall complete a report of the conditions and file a ocpy of such report with his agency headquarters.

Ohio Rev. Code § 2933.25 Form of search warrant.

Warrants issued under section 2933.21 of the Revised Code shall be substantially in the following form:

State of Ohio. . . . . County, ss:

To the sheriff (or other officer) of said County, greeting:

Whereas there has been filed with me an affidavit, of which the following is a copy (here copy the affidavit).

These are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime (or in the nighttime) into (here describe the house or place as in the affidavit) of the said . . . . . of the township of . . . . . in the County aforesaid, and

there diligently search for the said goods and chattels, or articles, to wit: (here describe the articles as in the affidavit) and that you bring the same or any part thereof, found on such search, and also the body of E.F., forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to law.

Given under my hand, this . . . . . day of . . . . . .

A.B., Judge, County Court

[Ohio R. Crim. P.]

RULE 41. Search and Seizure

(A) Authority to issue warrant. A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction, upon the request of a prosecuting attorney or a law enforcement officer.

(B) Property which may be seized with a warrant. A warrant may be issued under this rule to search for and seize any: (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

(C) Issuance and contents. A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming and describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request

for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

(D) Execution and return with inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken, or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. Property seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant.

(E) Return of papers to clerk. The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection therewith and shall file them with the clerk.

(F) Definition of property and daytime. The term "property" is used in this rule to include documents, books papers and other tangible objects. The term "daytime" is used in this rule to mean the hours from 7:00 a.m. to 8:00 p.m.

[Fed. R. Crim. P.]

Rule 41. Search and Seizure

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property of Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable-cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant Upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime,

unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant upon Oral Testimony.

(A) General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and

shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional Rule for Execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession, premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on an issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) Return of Papers to Clerk. The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

90-1616

Supreme Court, U.S.
FILED
APR 5 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO,
Petitioner,

v.

LARRY WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

SUPPLEMENTAL APPENDIX

Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402
(419) 354-9250

Attorney for Petitioner

These pages are substituted for pages 35-47
in the Appendix to the Petition.

Fostoria Municipal Court
213 S. Main St.
Fostoria, OH 44830

State of Ohio
vs.
Larry E. Williams
3094 Baird Rd.
Fostoria, Perry Twp., Wood Co., Ohio 44830
brown brick house, large burgundy or red
colored barn and several outbuildings
(Brief description of Person/Place)

Wood County, Ohio
To: Dep. Rex Russell, Wood County Sheriff's Office
(or any law enforcement officer with authority)

SEARCH WARRANT

From affidavit(s) sworn before the judge of a court of record, I, as judge of this court of record, find the grounds exist (probable cause) for issuing this warrant.

YOU ARE COMMANDED TO SEARCH the Person/Place and seize the Property, described below. Your search shall be within the territorial jurisdiction of this court,within three days (excluding the date this warrant is issued, Saturday, Sunday, and any legal holiday), and (X one): only in the daytime (7:00 a.m.to 8:00 p.m.). at anytime of day or night. Promptly return this warrant, together with a written inventory of any property taken (X one): to the undersigned judge. to (judge's name and court's name and location)

Property to be searched for and seized (description):
Marijuana plants, growing paraphernalia, and any equipment relative to the cultivation, manufacture, or engagement in any part of the production of any controlled substance.

Person/Place to be searched (description):
Entire property of Larry E. Williams.
Marijuana plants, growing paraphernalia, and any equipment relative to the cultivation, manufacture, or engagement in any part of the production of any controlled substance.
Which includes: the entire house and basement, the barn and all outbuildings or structures, the vehicles on the premises, and the entire curtilage.

twp. of Perry, Wood County, Ohio
1/15/88 at _____

_____
Judge (signature)

Fostoria Municipal Court
213 S. Main St.
Fostoria, OH 44830

State of Ohio
vs.
Larry E. Williams
3094 Baird Rd.
Fostoria, Perry Twp., Wood Co., Ohio 44830
brown brick house, large burgundy or red
colored barn and several outbuildings
(Brief description of Person/Place)

No. 88 CR-N SW-3
AFFIDAVIT
(For Search Warrant)

Wood County, Ohio
Dep. Rex Russel, Wood County Sheriff Office,
affiant, states these facts and circumstances:

(1) [Property-Provision of law violation relationship.] The Property to be searched for and seized is involved with the Provision of law violation.

(2) [Property-Person/Place relationship.] The Property to be searched for and seized will be found on/at the Person/Place to be searched.

(3) [Nighttime search authority (if applicable).] There is reasonable cause for permission to search in the nighttime, as well as the daytime.

Provision of law violation (description - code, section number, name of offense): § 2925.03, cultivation, manufacture or engagement in any part of the production of a controlled substance

Property to be searched for and seized (description):
Marijuana plants, growing paraphernalia, and any equipment relative to the cultivation, manufacture, or engagement in any part of the production of any controlled substance.

Person/Place to be searched (description):
Entire property of Larry E. Williams.
Marijuana plants, growing paraphernalia, and any equipment relative to the cultivation, manufacture, or engagement in any part of the production of a controlled substance.
Which includes: the entire house and basement, the barn and all outbuildings or structures, the vehicles on the premises, and the entire curtilage

twp. of Perry, Wood County, Ohio

Probable cause for search (facts and circumstances, stated here or in an attached exhibit):
I, Dep. Rex Russell, affirm that I am Deputy Sheriff with the Wood Co. Sheriff's Office, with 15 years' experience in law enforcement. I have an associate degree in law enforcement technology and will receive a B.A. in Dec., 1988 in criminal justice from BGSU. I have executed numerous search warrants relative to drug trafficking, most which resulted in indictment and/or conviction.

(A) The affiant has a reliable, confidential informant, who must remain confidential, since exposure of his identity would endanger his well-being. Said informant has on prior occasions given the affiant drug information that has resulted in two felony drug charges that will be presented to the Wood Co. Grand Jury next week. Said informant has also on past occasions provided information to Ptlm. Mike Clark, Fostoria Police Dept., which has proven to be accurate. (See Affidavit A) The basis of the informant's knowledge is his first-hand, personal observation of 50-60 marijuana plants being grown by Larry E. Williams at the address given, within the past four weeks.

(B) The affiant has a second confidential informant who is anonymous and whose information is very fresh. Said second informant relates that an observation was made, within the last three days at the Williams property, that there are a large number of marijuana plants being grown in the house and on the curtilage of the above described premises. See attached Affidavit B, a sworn statement of Tim Hatfield, police dispatcher, who took several calls from said informant.

(C) The said Larry E. Williams, DOB 9-2-53, owner and/or occupier of the premises, has one prior drug arrest and has been convicted of a felony drug charge, trafficking in

marijuana, and was sentenced to 1-5 years' imprisonment on 12-16-82. See attached Affidavit C, a teletype report from Fremont Police Department.

Permission for nighttime search (from 8:00 p.m. to 7:00 a.m.) is not requested

Incorporated into this affidavit are the following (X if applicable)

X Other: sworn affidavits from Tim Hatfield, police dispatcher; Ptlm. Mike Clark, Fostoria Police Dept., and teletype report showing prior drug trafficking conviction

Sworn to before me,
of a court of record, and
signed in my presence on:
7/15/88 at 2:45 p.m.

Dep. Rex. Russell
Affiant (signature)

William R. McMahon
Judge (signature)

Intentionally left blank.

AFFIDAVIT A

Sworn interview between Deputy Rex Russell asking the question and Patrolman Mike Clark answering.

Q. We have been hearing from the confidential informant, the same confidential informant that has provided information resulting in two felony charges being presented to the Wood County Grand Jury. This confidential informant has also given you, Patrolman Clark of the Fostoria Police Department information and could you tell me if any of the information was useful and would be considered legitimate and if any such information has resulted in convictions?

A. I used the same informant in other cases that has resulted in arrests and convictions.

Q. Has the informant given you information prior to today regarding the Williams subject living at 3094 Baird Road and his cultivating marijuana?

A. Same subject has given me information on the Williams subject about illegal marijuana cultivating.

*Mike Clark*_____
Mike Clark

Sworn to and subscribed before me this 15th day of July, 1988.

*Rex E. Russell*_____
Notary Public
Rex E. Russell
Notary Public, State of Ohio
My Commission Expires
April 2, 1991

AFFIDAVIT B

Sworn interview between Deputy Rex Russell asking questions and Tim Hatfield answering.

Q. Tim, on July 14, 1988, you received two phone calls from an anonymous person regarding drug information. Can you describe the conversation and describe the lady's sincerity and veracity?

A. When I received the call she made it very clear that she wanted to stay anonymous. I would not consider her to be a teenager she was very sincere. She advised me that her son had spent the night at a location on Baird Road the address would be 3094 Baird Road. I questioned her as to the occupants' names and she advised me that Larry or Barry Williams she was very concerned because there was pot growing in the basement and behind the chicken coop. She advised numerous times through the conversation that the Williams fella was either on parole or probation and that she wanted to stay anonymous. I questioned her as to the residence and she advised me that the barn was burgundy or maroon in color and the house is large in size and brown in color. I attempted to get as much information as I possibly could but I was limited because her son was not too far and she did not want him to know that she was calling the police department. She was calling me from a pay phone, I could hear traffic in the background and every question that I asked her she was very sincere in answering them and there was a scared tone in her voice.

Q. Did this lady seem concerned enough about this information to call you back the second time?

A. She called me again later in the afternoon on the 14th of July with more information that she had received from her son. She advised me her son had gone to a bar supposedly in West Milgrove to play pool and while Mr. Williams drank beer. The pool table was at the back of the bar and Mr. Williams' son took the youth to the back of the bar and told him to look out the window where several marijuana plants were also growing. The lady

advised Mr. Williams called the owner of the bar by the name of Pat. Again she refused to disclose her name and expressed concern and advised me if she found out any other information she would get back with me.

Q. You have literally received thousands of phone calls in your career, do you consider this lady a sincere and concerned informant?

A. Yes, I honestly do.

Tim Hatfield
Tim Hatfield

Sworn to and subscribed before me this 15th day of July, 1988.

Rex E. Russell
Notary Public
Rex E. Russell
Notary Public State of Ohio
My Commission Expires
April 2, 1991

SEARCH WARRANT

RETURN OF SEARCH WARRANT

On 7/15/88, I received this warrant, and (complete A or B):

A. Warrant served. On 7/16/88 at 11:00 a.m., I executed this warrant at the place or upon the person named therein. Thereafter (X one):

Person present. I gave a copy of this search warrant to *Larry E. Williams*, the person searched or at whose place the search was made.

7/18/88 Wood County Sheriff W25 *Dep. Rex Russell*
(signature)

INSTRUCTIONS
(to officer executing search warrant)

"Legal holiday" is defined in R.C. 1.14; but see also R.C. 124.18 and E.C. 124.19

The Knock and Announce Statute (R.C. 2934.12) provides in substance that before you can break down an outer or inner door or window of the place to be searched, you must take these steps. (1) Knock (at the door or window). (2) Announce your identity. Example: "We're police officers." (3) Announce your authority. example: "We have a search warrant . . ." (4) Announce your purpose. Example: " . . . to search this building." (5) Announce your demand. Example "Open the door." (6) Receive a refusal or, after a reasonable time, no response.

Supreme Court, U.S.
FILED
JUN 6 1991
OFFICE OF THE CLERK

(3)

NO. 90 - 1616

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO,
Petitioner,

v.

LARRY WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

Alan R. Mayberry
Wood County Prosecuting Attorney
Counsel of Record
One Courthouse Square
Bowling Green, Ohio 43402
(419) 354-9250

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. THE OPINION OF THE SUPREME COURT OF OHIO IS NOT BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS 1

II. SEARCHES CONDUCTED PURSUANT TO AN UNSIGNED SEARCH WARRANT ARE NOT WARRANTLESS SEARCHES 4

III. THE DECISION OF THE COURT BELOW CONFLICTS WITH DECISIONS OF THIS COURT 5

CONCLUSION 5

TABLE OF AUTHORITIES

CASES PAGE

Caldwell v. Mississippi, 472 U.S. 320 (1985).....1

Commonwealth v. Pellegrini, 405 Mass. 86, 539 N.E.2d 514, *cert. denied*, __ U.S.__, 110 S. Ct. 497, 107 L. Ed. 2d 501 (1989).....4

Commonwealth v. Peticca, Pa. Super. Ct., No. 392 Philadelphia 1990, 1-29-91, 48 Cr. L. 1417.....4

Delaware v. Prouse, __ U.S.__, 99 S. Ct. 1391 (1979) 3

Kettering v Hollen, 64 Ohio St. 2d 232, 416 N.E.2d 598 (1980).....2

Mapp v. Ohio, 367 U.S. 643 (1961).....2

Massachusetts v. Sheppard, 468 U.S. 981 (1984).....3

Michigan v. Long, 463 U.S. 1032 (1983).....1

New York v. P.J. Video, Inc., 475 U.S. 868 (1986).1,3

State v. Geraldo, 68 Ohio St. 2d 120, 429 N.E.2d 141 (1981).....2

State v. Spaw, 18 Ohio App. 3d 77, 480 N.E.2d 1138 (1984).....2

State v. Unger, 67 Ohio St. 2d 65, 423 N.E.2d 1078 ... (1981).....2

State v. Wilmoth, 22 Ohio St. 3d 251, 490 N.E.2d 1236 (1986).....2

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV.....1,2,3,4,5,6

Ohio Const. Art. I, §14.....1,2,3

STATUTORY PROVISIONS

Ohio Rev. Code §2933.25.....3

The Respondent has raised several points in his brief in opposition to which the State feels compelled to respond.

I. THE OPINION OF THE SUPREME COURT OF OHIO IS NOT BASED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Respondent erroneously asserts that the opinion of the court below is based on adequate and independent state grounds. This simply is not true. The Respondent urges that this Court is without jurisdiction because the opinion of the court below refers not only to the Fourth Amendment to the United States Constitution but also to Article I, § 14 of the Ohio Constitution. The Respondent obviously believes that this "dual reference" manifests the lower court's intention to rest its decision on state law. However, the State submits that neither the syllabus to the court's opinion nor the body of the opinion itself contains any "plain statement" manifesting such an intent. See *Michigan v. Long*, 463 U.S 1032 (1983). In fact, the State submits that this "dual reference" implies a contrary intent.

In *New York v. P. J. Video, Inc.*, 475 U.S. 868 (1986), this Court rejected an argument identical to that put forward by the Respondent here. In that case, the respondent argued that the decision of the New York Court of Appeals rested on the New York Constitution and various state court decisions, and that this Court therefore lacked jurisdiction to review that decision. This Court, referring to its opinion in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), stated that,

> We will not assume that a state-court decision rests on adequate and independent state grounds when the state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion. *Id.* at 327, quoting *Long*, supra.

That the Supreme Court of Ohio felt compelled to reach its decision because of federal law requirements will be made clear in the following analysis.

There exists in Ohio case law not a single case which even remotely suggests that Ohio courts are inclined to grant citizens

greater protection under the state constitution than is provided under the federal constitution where search and seizure issues are concerned. In fact, the Supreme Court of Ohio has made it clear in past opinions that Article I, § 14 of the Ohio Constitution and the Fourth Amendment are identical in scope. See, e.g., *State v. Wimoth*, 22 Ohio St. 3d 251, 490 N.E.2d 1236 (1986); *State v. Spaw*, 18 Ohio App. 3d 77, 480 N.E.2d 1138 (1984).

Furthermore, it has been a long-standing practice in Ohio to apply the exclusionary rule mandated upon the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), only in cases where violations of a constitutional nature are involved. The Supreme Court of Ohio made this axiom clear in *Kettering v. Hollen*, 64 Ohio St. 2d 232, 416 N.E.2d 598 (1980). In that case, the court stated,

> The exclusionary rule has been applied by this court to violations of a constitutional nature only. In *State v. Myers*, (1971), 26 Ohio St. 2d 190, 196, this court enunciated the policy that the exclusionary rule would not be applied to statutory violations falling short of constitutional violations, absent a legislative mandate requiring the application of the exclusionary rule. In *State v. Downs* (1977), 51 Ohio St. 2d 47, 63-64, the violation of Crim. R. 41 with respect to the return of a search warrant was described as non-constitutional in magnitude and the exclusionary rule was not applied. Also, in *State v. Davis* (1978), 56 Ohio St. 2d 51, it was held that fingerprint evidence obtained in violation of a statute does not have to be excluded.
>
> It is clear from these cases that the exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights. *Id.* at 234-235.

This reasoning was followed in subsequent cases as well. See, e.g., *State v. Unger*, 67 Ohio St. 2d 65; 423 N.E.2d 1078 (1981); *State v. Geraldo*, 68 Ohio St. 2d 120; 429 N.E.2d 141 (1981); *State v. Wilmoth*, 22 Ohio St. 3d 251, especially at 262-263; 490 N.E.2d 1236 (1986).

These cases all stand for the proposition that, in order for the exclusionary rule to apply, there must have been: 1) police

misconduct, which 2) violated some constitutional right. By the Supreme Court of Ohio's suppressing the evidence in this case, it has made the pronouncement that the Fourth Amendment requires a signature on a search warrant in order for that warrant to issue. This reasoning is in direct conflict with the spirit of *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). If the rationale behind the exclusionary rule is to deter police misconduct, then that rationale finds no application here. In this case, there was no police misconduct, only an error on the part of the issuing magistrate. Application of the exclusionary rule here serves no function in furtherence of Fourth Amendment concerns.

There is no legislative mandate in Ohio requiring that evidence taken in violation of Ohio Rev. Code §2933.25 be suppressed. Reference to this statutory provision in the opinion below merely acts to further drive home the point that the Supreme Court of Ohio felt compelled to construe this statutory provision in a way so as to give effect to what it believes is mandated by Fourth Amendment requirements. Violation of this provision alone is not a sufficient basis upon which to suppress the evidence in this case. This is made apparent by prior pronouncements of the Supreme Court of Ohio. See discussion *supra*.

Assuming arguendo the Ohio Constitution would have provided an adequate basis for the judgment below, it is apparent that the Supreme Court of Ohio did not intend to rest its decision independently on the state constitution and this Court therefore has jurisdiction over this case. This is evident from the opinion below where the court states that Article I, §14 of the Ohio Constitution mirrors the Fourth Amendment and by the fact that the Ohio Constitution was always cited in conjunction with the Fourth Amendment. See *Delaware v. Prouse*, __ U.S. __, 99 S. Ct. 1391 (1979); *P.J. Video, Inc.*, *supra*.

Based on the foregoing analysis, the State respectfully submits to this Court that it does have jurisdiction to entertain a review of this case. There is absolutely no indication from the language of the opinion or the syllabus to the case which indicates any intent of the court below to base its decision on purely state grounds. By suppressing the evidence here, the Supreme Court of Ohio has evinced its willingness to raise to a constitutional level the "requirement" for a signature on an

otherwise valid warrant in order for it to issue under the Fourth Amendment.

II. SEARCHES CONDUCTED PURSUANT TO AN UNSIGNED SEARCH WARRANT ARE NOT WARRANTLESS SEARCHES.

The Respondent's assertion that searches conducted pursuant to an unsigned search warrant are warrantless searches begs the very question before this Court. Furthermore, this assertion is in direct conflict with the decisions of other state courts of last resort and the United States Court of Appeals for the Second Circuit. The Respondent's discussion under this proposition actually serves to highlight the fact that this issue is one which is arising more and more frequently in the state courts which in turn consistently come to diametrically opposed conclusions as to what is required by the Fourth Amendment.

Just twenty days after the decision rendered by the Supreme Court of Ohio in this case, the Pennsylvania Court of Appeals handed down its decision that technical errors in the issuance of warrants alone are not enough to invalidate otherwise good warrants. *Commonwealth v. Peticca*, Pa. Super. Ct., No. 392 Philadelphia 1990, 1-29-91, 48 Cr. L. 1417. The Pennsylvania court adopted the position that the State is advocating here; i.e., a search warrant is fatal only if it prevents a reviewing court from later determining whether issuance of the warrant was proper.

The Pennsylvania court's ruling is just one more in a series of inconsistently decided state court decisions which purport to proclaim what the Fourth Amendment requires. A good discussion of this is contained in the State's petition for writ of certiorari and will not be repeated here. However, the State does redirect this Court's attention to *Commonwealth v. Pelligrini*, 405 Mass. 86, 539 N.E.2d 514, *cert. denied*, __ U.S. __, 110 S. Ct. 497, 107 L. Ed. 2d 501 (1989). In that case, this Court let stand the Massachusetts Supreme Judicial Court's ruling that an unsigned search warrant does not violate the Fourth Amendment. That holding is directly counter to the Respondent's argument here. The State submits that by refusing to take this case, this Court will in effect be making a dangerous announcement that state courts are free to decide Fourth Amendment issues, indeed all consitutional issues, in

an inconsistent fashion and that this Court will do nothing to clarify those issues. The State submits that such a practice would run counter to one of the most important functions for which this Court was created - the function of ensuring that the United States Constitution is uniformly interpreted throughout all the fifty states. The position urged upon this Court by the Respondent here would thwart that function.

Based on the foregoing argument and those already presented, the State respectfully urges this Court to grant the State's petition for writ of certiorari so that this important constitutional issue may be finally resolved.

III. THE DECISION OF THE COURT BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The State has already addressed this issue and will not do so again here. However, the State would point out that the issue of whether the warrant in this case was issued upon a good showing of probable cause is not one which is ripe for review. It has not been properly preserved for consideration here, and the State submits that its inclusion in the Respondent's argument at this point merely serves to deflect this Court's attention from the real issue before it. This "smoke screen" effort is improper and should not be condoned. Should this Court have any question about whether probable cause existed or should it decide that that issue is germane to a decision here, the State would direct this Court's attention to the affidavits in the appendix attached to the State's petition and let this Court come to its own conclusion.

The State respectfully requests this Court to find the Respondent's argument here not well-taken and that it not be considered when deciding the issue at hand.

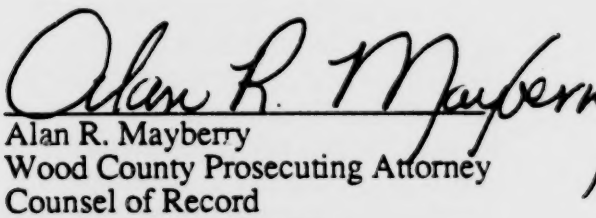
CONCLUSION

The decision of the court below is based on an erroneous interpretation of what is required by the Fourth Amendment and this Court's interpretation of it. It is also in conflict with the decisions of various state courts of last resort, while at the same time being consistent with the decisions of other state courts of last resort. Thus, it is apparent that this issue is one which is generating a great deal of confusion among those

courts. The decision below is also at odds with that of various United States Courts of Appeals. It is not a decision that is based solely on the state constitution as are some of the other opinions cited by the Respondent in support of his position.

The State respectfully submits that this issue is ripe for this Court and that clarification and guidance are needed in order for consistent application of the Constitution of the United States. It is respectfully urged that this Court grant the State of Ohio's petition for writ of certiorari to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,



Alan R. Mayberry
Wood County Prosecuting Attorney
Counsel of Record
One Courthouse Square
Bowling Green, Ohio 43402
(419) 354-9250

No. 90-1616

RECEIVED
JUN 5 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JUN 20 PAGE - 2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF OHIO,

Petitioner,

v.

LARRY WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

RANDALL M. DANA
Ohio Public Defender

ROBERT L. LANE
Chief Appellate Counsel
Counsel of Record

JILL E. STONE
Assistant State Public Defender

Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, Ohio 43266-0587
614/466-5394

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THIS COURT REVIEW A CASE IN WHICH THE SUPREME COURT OF OHIO HAD ADEQUATE AND INDEPENDENT STATE GROUNDS ON WHICH TO BASE ITS DECISION?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....iii

JURISDICTION.....1

STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....3

REASON FOR NOT GRANTING THE WRIT.....3

I. THE OPINION OF THE SUPREME COURT OF OHIO IS BASED UPON ADEQUATE AND INDEPENDANT STATE GROUNDS AND SHOULD NOT BE REVIEWED BY THIS COURT.....3

II. ABSENT ANY APPLICABLE EXCEPTION TO THE WARRANT REQUIREMENT, A SEARCH AND SEIZURE MADE INSIDE A HOME, PURSUANT TO A "WARRANT" NOT SIGNED BY A NEUTRAL AND DETACHED MAGISTRATE IS A WARRANT-LESS SEARCH AND SEIZURE.....7

III. THE DECISION OF THE OHIO SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.....10

CONCLUSION.....15

CERTIFICATE OF SERVICE.....16

APPENDIX.....17

Motion to Suppress Hearing, Excerpt of the Cross-Examination of Officer Russell.....18

TABLE OF AUTHORITIES

CASES: Page

Adams v. Williams, 407 U.S. 147 (1981).....12

Alabama v. White 496 U.S. ___, 110 L. Ed. 2d 301, 110 S. Ct. ___ (1990).....12,13

Enterprise Irrigation District v. Farmers Mutual Canal Co. 243 U.S. 157 (1917).....7

Fox Film Corp. v. Muller, 296 U.S. 207 (1935).....6

Henry v. United States, 361 U.S. 98 (1959).....11

Herb v. Pitcairn, 324 U.S. 117 (1945).....5

Illinois v. Gates 462 U.S. 213 (1984).....12,13

Masheter v. Kebe, 49 Ohio St. 2d 148 (1976).....6

Michigan v. Long, 469 U.S. 1032 (1983).....5

Payton v. New York, 445 U.S. 573, ___ (1980).....7,10,14

People v. Hentkowski, 154 Mich. App. 171 (1986).....4,9

State v. Spaw, 18 Ohio App. 3d 77 (1984).....3,4

State v. Surowiecki, 184 Conn. 95 (1981).....4,8

State v. Williams, 57 Ohio St. 3d 24 (1991).....**passim**

United States v. Leon, 468 U.S. 897 (1984)...10,11,12,13,14

Whitely v. Warden, 401 U.S. 560 (1971).....14

Williamson Co. v. Radich, 128 Ohio St. 124 (1934).....6

Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977).....6

CONSTITUTIONAL PROVISIONS:

Fourth Amendment, United States Constitution.....**passim**

Section 14, Article I, Ohio Constitution.....5,14

TABLE OF AUTHORITIES

STATUTORY PROVISIONS: Page

28 U.S.C. Section 1257(a).....1

Section 2933.24(A), Ohio Revised Code.....1

Section 2933.25, Ohio Revised Code.....2

JURISDICTION

The judgment of the Ohio Supreme Court was based upon adequate and independent state law grounds, and not upon any provisions of the United States Constitution or other federal law. Therefore, 28 U.S.C. Section 1257(a) does not confer jurisdiction in this Court.

STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions listed in petitioner's petition for certiorari, this case also involves the following:

Former Ohio Revised Code Section 2933.24(A). Contents of search warrant; report of inspection findings.

> (A) A warrant for search shall be directed to the proper officer, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite all the material facts alleged in the affidavit, and particularly described the things to be searched for, the house or place to be searched, and the person to be searched and seized. Such warrant shall command the officer to search such house or place or person named or described for the property or other things, and to bring them, together with the person to be seized, before the judge or magistrate. The command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search in the night in which case a search in the night may be ordered. Such search warrant shall be returned by the officer holding the same not later than three days after the issuance. It shall designate the judge or magistrate to whom it shall be returned, if such judge is available.

Ohio Revised Code Section 2933.25. Form of search warrant.

> Warrants issued under section 2933.21 of the Revised Code shall be substantially in the following form:
> State of Ohio,.....County,ss:
> To the sheriff (or other officer) of said County, greeting:
>
> Whereas there has been filed with me an affidavit of which the following is a copy (here copy the affidavit).
>
> These are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime (or in the nighttime) into (here describe the house or place as in the affidavit) of said ..... of the township of ..... in the County aforesaid, and there diligently search for the said goods and chattels, or articles, to wit: (here describe the articles as in the affidavit) and that you bring the same or any part thereof, found on such search, and also the body of E. F., forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to law.
>
> Given under my hand, this ..... day of .....
>
> A.B., Judge, County Court

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case, with the following additions: Petitioner correctly states that, in the state courts of Ohio, respondent raised his claims pursuant to the Fourth Amendment. However, respondent also invoked the protections of the Ohio Constitution, as well as Ohio statutes and procedural rules.

STATEMENT OF THE FACTS

Respondent accepts the facts as presented by petitioner in its certiorari petition, with the following additions: The anonymous woman who called the Fostoria Police Department did not personally observe any marijuana or other evidence of criminal conduct. Her statements to Police Dispatcher Tim Hatfield were based upon her son's alleged observations. She had no personal knowledge regarding the "information" she was giving to the police.

The police failed to corroborate the anonymous caller's information. The police did nothing, other than discover respondent's prior offenses, to verify the anonymous caller's information.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE OPINION OF THE SUPREME COURT OF OHIO IS BASED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS AND SHOULD NOT BE REVIEWED BY THIS COURT.

The Supreme Court of Ohio held that a search warrant is void **ab initio** if not signed by a judge prior to the search. **State v. Williams**, 57 Ohio St. 3d 24 (1991). The Supreme Court's decision is based upon Ohio law.

The court begins its analysis with a discussion of **State v. Spaw**, 18 Ohio App. 3d 77 (1984). **State v. Williams**, 57 Ohio St. 3d at 24. In **Spaw**, the Ohio Court of Appeals held:

> ... what otherwise purports to be a search warrant is not a search warrant when it lacks

> any signature at all, and the officers here could not reasonably presume its validity. It never acquired the status of being merely voidable but did not exist as a warrant and was void **ab initio**.

State v. Spaw, 18 Ohio App. 3d at 79.

In deciding the **Williams** case, the Ohio Supreme Court adopts the view expressed in **Spaw** and then discusses Ohio's pertinent statutory provisions and procedural requirements. **State v. Williams**, 57 Ohio St. 3d at 25. The court's interpretation of those statutes and the procedural rule form part of the basis of its decision:

> We reach our decision for several reasons. Search warrants are issued pursuant to the authority found in R.C. 2933.21 and Crim. R. 41. R.C. 2933.25 dictates the form of a search warrant. (Footnote omitted). Included in the example form is the issuing judge's signature. Further, R.C. 2933.24(A) provides that "... [s]uch warrant **shall command** the officer to search such house or place or person named or described for the property or other things ..." (Emphasis added.) A command without a known commander cannot be a command.

State v. Williams, 57 Ohio St. 3d at 25.

The court then examines the decisions of two cases from other states, **State v. Surowiecki**, 184 Conn. 95 (1981) and **People v. Hentkowski**, 154 Mich. App. 171 (1986). The court cites these cases with approval. In each case, the respective court found that a magistrate's signature was required on a search warrant. **State v. Williams**, 57 Ohio St. 3d at 25-26.

The Supreme Court of Ohio continues its analysis by mentioning two other areas of Ohio law in which a signature is required. **Id.** The court notes that Ohio law requires a signature for a transfer of real property and for a will. **Id.**

The majority opinion in **Williams** makes absolutely no mention of federal case law, federal statutory provisions, or federal procedural rules. There are no citations to any opinions of this Court. In three places, the majority opinion briefly mentions the Fourth Amendment, but it is always in connection with the Fourth Amendment's virtually identical counterpart of the Ohio Constitution, i.e., Section 14, Article I. The court always cites the Fourth Amendment either in the same sentence with the Ohio constitutional provision or in the sentence immediately preceding the citation to the Ohio provision. The Ohio Supreme Court does not engage in any type of analysis of the Fourth Amendment or the federal case law which the amendment has generated.

The decision of the Ohio Supreme Court in **State v. Williams** was based on "adequate and independent state grounds" and should not be reviewed by this Court. **Michigan v. Long**, 469 U.S. 1032, 1043 (1983). The principle that this Court does not review state court judgments that rest on adequate and independent state grounds is based, in part, on this Court's limited jurisdiction. **Id.** at 1041-1042, citing **Herb v. Pitcairn**, 324 U.S. 117, 125 (1945). This Court does not render "advisory opinions." **Id.** If this Court were to render a decision on Fourth Amendment grounds, the Ohio Supreme Court's decision would remain unaffected. Since it is based on state law, the Ohio Supreme Court's judgment would remain the same, regardless of this Court's position on the federal law. **Id.**

The Ohio Supreme Court is the final authority on questions of Ohio law and the Ohio Constitution. In Ohio, "the syllabus of a decision of the Supreme Court of Ohio states the law of Ohio." **Williamson Co. v. Radich**, 128 Ohio St. 124, 126 (1934). "Only that which is stated in a syllabus or in a **per curiam** opinion represents a pronouncement of the law of Ohio." **Masheter v. Kebe**, 49 Ohio St. 2d 148, 150 (1976). This Court should look at the syllabus for a "plain statement" demonstrating that adequate and independent state grounds were the basis for decision.

The syllabus issued by the Court in **State v. Williams** reads as follows:

> A search warrant is void **ab initio** if not signed by the judge prior to the search.

Id. at 24.

It is immediately apparent that the syllabus in **Williams** is not based on the federal constitution, federal statutes, or federal case law. The court's opinion clarifies the syllabus and clearly demonstrates that it is based on Ohio law. The state law grounds are both independent of any federal grounds and adequate to support the judgment of the Ohio Supreme Court. **Fox Film Corp. v. Muller**, 296 U.S. 207, 210 (1935).

It is equally clear that the Ohio Supreme Court's decision was not the result of its feeling "compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." **Zacchini v. Scripps-Howard Broadcasting Company**, 433 U.S. 562, 568 (1977). The lack of any citations to federal statutes or case law, the lack of any federal analysis and only bare citations to the

Fourth Amendment (in conjunction with citations to the Ohio Constitution) indicate that the Ohio Supreme Court was not compelled to rule as it did by its understanding of federal law. The court's decision was the result of its analysis of Ohio law. The state law ground was not "interwoven" with federal grounds. **See Enterprise Irrigation District v. Farmers Mutual Canal Co.** 243 U.S. 157, 164 (1917).

In the case at bar, the judgment of the Ohio Supreme Court is based upon Ohio law grounds, independent of any federal law considerations. Those state law grounds are adequate to support the Supreme Court's judgment. Therefore, this Court should not review that judgment.

II. ABSENT ANY APPLICABLE EXCEPTION TO THE WARRANT REQUIREMENT, A SEARCH AND SEIZURE MADE INSIDE A HOME, PURSUANT TO A "WARRANT" NOT SIGNED BY A NEUTRAL AND DETACHED MAGISTRATE IS A WARRANTLESS SEARCH AND SEIZURE.

While Mr. Williams asserts that the Ohio Supreme Court's decision in **State v. Williams, supra** is based on adequate and independent state grounds, the decision is also compelled by the dictates of the Fourth Amendment. A search of a home without a warrant is presumptively unreasonable and the evidence seized pursuant to such a search must be suppressed. **Payton v. New York**, 445 U.S. 573 (1980).

The State of Ohio is attempting to create a valid search warrant where none existed. The only markings on the form marked "search warrant" were those made by the police officers (see Supplemental Appendix to state's petition for writ of certiorari,

pp. 35-36). An unsigned warrant is a "form" with no legal significance. A "form" with typing on it has no legal significance until signed by a "neutral and detached magistrate," authorizing the intrusion requested by the state. Without that signature, no warrant exists. As the Ohio Supreme Court observed:

> A command without a known commander is not a command.

State v. Williams, 57 Ohio St. 3d at 25.

What constitutes a valid search warrant is a question of state law. In **Williams**, the Ohio Supreme Court held that in Ohio, a warrant is void without a signature.

The Ohio Supreme Court further emphasized the importance of a neutral and detached magistrate's signature as a means to insure that Ohio citizens are secure in their homes from unreasonable intrusions.

> Without having the signature of the authorizing magistrate affixed to the warrant, a citizen is left to guess whether such a warrant has validity.

Id.

Without a magistrate's signature, the citizen's assurance that a warrant is indeed an enforceable court order disappears. The Ohio Supreme Court adopted the Connecticut Supreme Court's reasoning in **State v. Surowiecki**, 184 Conn. 95, 97-98 (1981) that:

> [T]he signing of a search warrant is the only identifiable objective manifestation of a judge's subjective intent to issue a search warrant. **Id.** at 26.

State v. Williams, 57 Ohio St. 3d at 25.

As the Michigan Court of Appeals observed in **People v. Hentkowski**, 397 N.W. 2d 255, 259 (Mich. App. 1986) and cited with approval in **Williams**, 57 Ohio St. 3d at 25-26:

> The custodian should not have to guess as to whether a magistrate intended or did not intend to sign the document which is presented to the custodian.

If a signature is not required on a warrant, a citizen could not distinguish between an "actual warrant and one that is legally unenforceable," nor could a citizen "determine whether or not they are required to allow officers to conduct the search. (cite omitted). **State v. Williams**, 57 Ohio St. 3d at 26.

The Fourth Amendment prohibits "unreasonable searches and seizures." A search and seizure of a home conducted pursuant to an "unsigned warrant" is unreasonable. The State cannot be allowed to denigrate the importance of this protection by referring to the signature as a "ministerial" requirement. The magistrate's approval is manifested only by that signature. Receipt of the signature is the reason the officer presents the affidavits to the magistrate in the first place. It is not too much to ask an officer to check and see if the warrant has been signed and properly issued. The Fourth Amendment requires no less.

Since no warrant existed, neither the Wood County Court of Appeals or the Ohio Supreme Court had to consider whether the good faith exception to the exclusionary rule applied. Nor were the courts compelled to determine if the "warrant" was issued upon probable cause. These issues were simply irrelevant to any court's determination of the issues presented for review, since a search of a home without a warrant is presumptively unreasonable.

> [T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. 573, 590 (1980).

That 'firm line' at the entrance to Mr. Williams' house was "unreasonably crossed without a warrant." Although not based on Fourth Amendment grounds, the conclusion reached by the Ohio Supreme Court is no different than the conclusion compelled by the Fourth Amendment:

> A search warrant is void **ab initio** if not signed by the judge prior to the search. Evidence seized pursuant to such an invalid warrant must be suppressed.

State v. Williams, 57 Ohio St. 3d at 26.

The petition for writ of certiorari should be denied.

III. THE DECISION OF THE OHIO SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

The State of Ohio misconstrues the import of this Court's decision in **United States v. Leon**, 468 U.S. 897 (1984) and the conclusions to be drawn therefrom. The limits of the good-faith exception to the exclusionary rule were explained by this Court when Justice White wrote:

> We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated warrant cannot justify the substantial costs of exclusion. We do not suggest however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. ... Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, (cites omitted), and

> it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Id. at 922-923.

This Court described circumstances where suppression would be an appropriate remedy, two of which are present in this case:

> Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (cites omitted). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient ... that the executing officers cannot reasonably presume it to be valid." (cites omitted).

Id. at 923.

An analysis of this case reveals that, even if the warrant was signed, exclusion would be warranted.

The "good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." Id. at 922, footnote 23. First, the lack of a neutral and detached magistrate's signature on the warrant does not comport with the objective standard of reasonableness this Court emphasized in **Leon**. A reasonably well trained officer would have known that the search was illegal without the magistrate's authorization on the warrant. No other "officer" could rely on the unsigned warrant. Officer Russell's subjective belief in the validity of the warrant "is not enough" to bring this case under the umbrella of the good faith exception. **Henry v. United States**, 361 U.S. 98, 102 (1959).

Second, the warrant's affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (cites omitted). **Leon**, 468 U.S. at 923. The facts in this case are more closely aligned to those set forth in **Alabama v. White** 496 U.S. ___, 110 L. Ed. 2d 301, 110 S. Ct. ___ (1990) than those facts set forth in **Leon**. In **Alabama v. White, supra**, the issue was whether an anonymous tip, corroborated by police surveillance, provided sufficient reasonable suspicion for an investigatory, **Terry**-type stop. In this case, the issue is whether an anonymous tip, **not corroborated** by **any** investigatory activity, would be sufficient to establish probable cause. No effort was made to verify the information provided by the anonymous caller, even though the information could have been verified from a bar in West Millgrove, if such a bar existed. (See supplemental appendix to state's petition for writ of certiorari, pp. 45-46). Ironically, the information provided by the anonymous caller was not even corroborated by the officer's independent familiarity with West Millgrove. The officer testified during the suppression hearing that he was "familiar with West Millgrove" and, "as far as [he knew], there is no bar there." (Tr. 24, Appendix). Nor did law enforcement make any attempt to verify the tip received from the known informant a month earlier. **Adams v. Williams**, 407 U.S. 147 (1981). The good faith exception to the exclusionary rule and the "totality of the circumstances" standard enunciated in **Illinois v. Gates** 462 U.S. 213 (1984) were not developed as constitutional substitutions for independent police work and

subsequent verification of information received. Justice White's analysis in **Alabama v. White**, 110 L. Ed. 2d at 309 is applicable to this case:

> Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors -- quantity and quality -- are considered in the "totality of the circumstances -- the whole picture" (cites omitted) that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be needed to establish the requisite quantum of suspicion than would be required if the tip were more reliable. The **Gates** court applied its totality of the circumstances approach in this manner, taking into account the facts known to the officers from personal observation, and giving the anonymous tip the weight it deserved in light of its **indicia** of reliability as established through independent police work.

Id.

Comparing the lack of investigatory activity in this case with the investigatory accomplishments in **Leon** or even with the surveillance in **White**, one can easily see that the affidavits presented here were the type of "bare bones" affidavit this Court has never condoned. (Supplemental appendix to state's petition for writ of certiorari, pp. 43-46). The affidavits were so lacking in indicia of probable cause that no officer could rely upon them. This point was emphasized in **Leon** in footnote 24:

> Reference to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an

> officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. See **Whitely v. Warden**, 401 U.S. 560, 568 (1971).

Leon, 468 U.S. at 923.

This Court reaffirmed the purpose of the exclusionary rule in **Leon**:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.

Id. at 919.

In the instant case, at the very least, the state acted with negligence and callous disregard. This deprived Mr. Williams of the most "'clearly defined zone of privacy' protected by the Fourth Amendment -- the unambiguous physical dimensions of an individual's home." Paraphrasing **Payton v. New York**, 445 U.S. at 589.

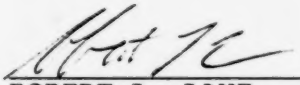
Throughout the petition, the State assumes that the affidavits established probable cause. No Ohio appellate court has made that determination, and respondent does not concede its existence. As noted earlier, the Ohio appellate courts never addressed the probable-cause issue because the warrant was so deficient under Ohio law, it was not a warrant at all. However, no constitutional principles, state or federal, would provide the state with the result it desires. No valid reason exists to grant the state's petition for writ of certiorari.

CONCLUSION

The Ohio Supreme Court's decision in **State v. Williams, supra**, reinforces state law principles but imposes no new burden on law enforcement. The decision simply requires the law enforcement officer to "check a signature line." Further, the rights that Section 14, Article I of the Ohio Constitution and the Fourth Amendment are designed to protect are significantly diminished if citizens are left at the threshold of their homes trying to distinguish between an actual warrant and one that is legally unenforceable. **Williams**, 57 Ohio St. 3d at 26. "To protect this constitutional right it is necessary to require the signature of the issuing judge on a search warrant prior to the search." **Id.** The rules, statutes, and constitution of Ohio require this protection. For the foregoing reasons, this Court should not grant the petition for writ of certiorari.

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender



ROBERT L. LANE
Chief Appellate Counsel
Counsel of Record

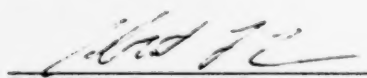
JILL E. STONE
Assistant State Public Defender

Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, Ohio 43266-0587
614/466-5394

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b), Rules of the Supreme Court, I hereby certify that a copy of the foregoing Respondent's Brief in Opposition was served on Petitioner State of Ohio by forwarding a copy to the office of its counsel, Alan R. Mayberry, Wood County Prosecuting Attorney, One Courthouse Square, Bowling Green, Ohio 43402, phone number 419/354-9250, by U.S. Mail on this 3rd day of June, 1991. I further certify that all parties required to be served have been served.



ROBERT L. LANE
Chief Appellate Counsel

COUNSEL FOR RESPONDENT

No. 90-1616

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF OHIO,

Petitioner,

v.

LARRY WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX

**MOTION TO SUPPRESS HEARING,
EXCERPT OF THE CROSS-EXAMINATION OF
OFFICER RUSSELL**

Q: Do you know if there is -- was a bar in West Millgrove on July 15, 1988?

A: I'm not familiar with one.

Q: I'm sorry?

A: I'm not familiar with one.

Q: You're familiar with West Millgrove?

A: Yes, indeed.

Q: But there is no bar in that town as far as you know?

A: As far as I know, there is no bar there.